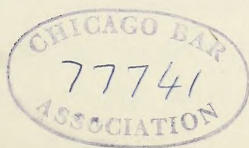


Digitized by the Internet Archive
in 2010 with funding from
CARLI: Consortium of Academic and Research Libraries in Illinois



FEB 9 '61

BOUND.....

PUBLISHED IN ABSTRACT

**Christian Rau, Phillip Bauman and Louisa Bauman,
Petitioner-Appelles, v. Village of Warrensburg, a
Municipal Corporation in the County of
Macon and State of Illinois, Respondent-
Appellant.**

302 I.A. 18

Appeal from Circuit Court of Macon County.

Gen. No. 9174

MR. JUSTICE HAYES delivered the opinion of the Court.

This is an appeal from an Order entered in the Circuit Court of Macon County, Illinois, on the seventh day of October, 1937, denying petition of appellant, the Village of Warrensburg, to vacate the original order entered by said Court on the twentieth day of March, 1934, disconnecting property of appellees from said village.

The original petition was filed in this cause on the ninth day of February, 1934, which contained the necessary allegations to bring it under the Act of 1933 for the disconnecting of agricultural land. Proper service was made upon the Village of Warrensburg, but it filed no answer to said petition and was defaulted. Evidence was heard by the Court and the issue was found for the appellees.

On the twentieth day of March, 1934, an Order was entered by the Court disconnecting each of the separate tracts from the corporate limits. The term of court adjourned on the twelfth day of May, 1934. Afterwards, and at a new term of Court,—being the October term—the Village filed a motion asking the Court to re-docket said cause for good cause shown, which motion was allowed. On the ninth day of January, A. D. 1935, the Village of Warrensburg filed its petition to vacate the order previously entered on the twentieth day of March, 1934. Said petition alleged that since the said Circuit Court had entered said Order on the twentieth day of March, 1934, the Supreme Court of the State of Illinois, in the case of *Clarissa Forsythe v. Village of Cooksville*, 356 Ill. 289, declared that the Act of 1933 for disconnection of agricultural lands from towns and villages violated the

constitutional provision against special legislation granting privileges and immunities to owners of certain lands not enjoyed by owners of other lands in the same municipality, and that the facts in the Cooksville case were similar in all respects to the instant case, and that by reason of said decision of the Supreme Court, there was no legislative act upon which the original petition in this case could properly be predicated, and that by reason thereof said Order of the twentieth day of March, 1934, was a nullity and should be vacated. On the twenty-fifth day of January, 1935, the village, on leave of Court, filed an amendment to its petition to vacate, charging fraud in the entry of the original order. On the seventh day of October, 1937, the Court entered an order denying the petition of the Village of Warrensburg to vacate the order of March 20, 1934.

Appellant bases its contention that the Circuit Court of Macon County erred in denying its application to vacate its order disconnecting the territory in question from the Village of Warrensburg, after the term of court in which said order was entered had expired, and at a subsequent term for the following reasons:

1. This was not a judicial proceeding, but a court simply carrying an administrative act of the Legislature.

2. This Court had no inherent right or jurisdiction over this type of action except the specific jurisdiction given it by a legislative act. Once that specific authority was determined unconstitutional the acts and orders of the Court were meaningless.

The Act of 1933, entitled An Act Providing for the Disconnecting of Agricultural Lands from Cities, Towns and Villages, provided that, if the owner of any tract of land lying within the corporate limits of any city, town, or village may have the same disconnected if such tract

1. Contains ten acres or more.
2. If used exclusively for agricultural purposes.
3. If not subdivided into lots and blocks.
4. If located on the border or boundary of a city, town or village.
5. If not bounded on more than two sides by land subdivided into lots and blocks.

The Act further provides for the owner to file a petition in the County or Circuit Court setting up the facts and making the city, town or village defendant, and if the court finds that the allegations are in accord with

Section 1 of the Act, and are true, the Court is directed to order the territory disconnected.

This Act was held unconstitutional by the Supreme Court of the State in the Cooksville case, *supra*, but the decision was made after the final order was entered in the instant case.

The General Assembly, at its next session, following the decision in the Cooksville case, passed a similar statute leaving out the objectionable feature of the 1933 act which required the land to be used exclusively for farming or agricultural purposes. The 1935 Act was not made curative by the legislature of cases arising under the 1933 act and not made retroactive.

The pertinent question on which this case turns is whether or not the Circuit Court had jurisdiction of the subject matter. Appellees contend that it had, and that it waived the constitutional question involved in the Act of 1933, by failing to defend or have it reviewed on a direct proceeding rather than collaterally. Appellant takes the position that without the Act of 1933, which has been declared invalid, that it did not have jurisdiction of the subject matter. Volume 2 of Cooley's Constitution of Limitations, 8th Edition, page 846 states,

"Where a court by law has no jurisdiction of the subject matter of a controversy, a party whose rights are sought to be affected by it is at liberty to repudiate its proceedings and refuse to be bound by them, notwithstanding he may once have consented to its action, either by voluntarily commencing the proceeding as plaintiff, or as defendant by appearing and pleading to the merits, or by any other formal or informal action. This right he may avail himself of at any stage of the case, and the maxim that requires one to move promptly who would take advantage of an irregularity does not apply here, since this is not mere irregular action, but a total want of power to act at all."

The Village of Warrensburg did not appear, plead, or defend. Judgment was taken by default. A similar question was reviewed in the case of *Mills v. People's Gas Light Company*, 327 Ill. 508, on pages 535, 536, and 537, the Court says:

"An unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is in legal contemplation as inoperative as though it had never been passed (*Norton v. Shelby County*, 118 U. S. 425). When a

statute is adjudged to be unconstitutional, rights cannot be built up under it; contracts which depend upon it for their consideration are void; it constitutes a protection to no one who has acted under it, and no one can be punished for having refused obedience to it before the decision was made (1 Cooley's Const. Lim., 8th ed., p. 382; *Board of Highway Comrs. v. City of Bloomington*, 253 Ill. 164). The Act of May 18, 1905, was adjudged to be unconstitutional, and for that reason it conferred no power or authority on the circuit court to fix rates to be charged for gas. Apart from the act, the circuit court had no power to prescribe such rates. The function of rate-making is purely legislative in its character; and this is true whether it is exercised directly by the legislature itself or by some subordinate or administrative body to which the power of fixing rates in detail has been delegated. The completed act derives its authority from the legislature and must be regarded as an exercise of the legislative power."

The formation of municipal corporations and the annexation and disconnection of the land forming its boundaries is purely a legislative act. This authority cannot be delegated by the legislature to the judiciary. For years the annexation and disconnection of lands pertaining to municipalities was done by filing petitions with the village board or council. If the village board found that the petition contained the proper allegations and were proven, it was then the duty of the village board to pass an ordinance annexing or disconnecting the land. In many cases the village boards did not act, or delayed in acting, requiring mandamus proceedings to be filed in courts of record. Until that point everything done was done by the village board as an administrative office or officers of the legislature. The legislature saw fit to take this administrative act out of the hands of the village boards and put it in the hands of an impartial and disinterested party. The legislature chose to use the court as its administrative agent to carry out for the legislature what it was impractical for the legislature to do itself, the act then providing that a petition be presented to the Circuit or County Court setting out certain necessary allegations and upon proving these, the petitioner was entitled to the relief as a matter of course and as an administrative act—rather than a judicial act—by a recognized judicial body.

In *Funke v. The Village of Elliott*, 364 Ill. 604, 608, the Court held that a city or village is a creature of the statute. It exists for such public purposes as may be granted it by the State as a subordinate branch of the State government. It is always subject to the legislative will. Article 3 of the State Constitution divides the forces of government into three departments: the legislative, executive and judicial. The power to incorporate a municipality necessarily carries with it the authority to determine and alter its boundaries, and such decision is a legislative and not a judicial function. By the Act (Act of 1935 for Disconnecting Territory from Villages) under consideration, the Circuit Court is required to determine whether the facts set forth in the petition and shown by the evidence bring the petitioner's property within the statute. The Court has no discretion in adjudicating what constitutes a sufficient petition or whether the petitioner's land shall be disconnected. The statute speaks the law; the Court determines only its execution.

What is said in the Village of Elliott case is equally applicable to the 1933 Act, for the two Acts are identical, except that the 1935 Act did not limit the remedy to the owner of lands used for farming purposes.

Under the Act of 1872, which authorized the village board to pass on the petition for the disconnection of territory from the corporate limits of the village instead of the county or circuit court, and in passing on this earlier statute the Supreme Court says in the case of *Young v. Carey*, 184 Ill. 613, 619:

"The board is not authorized to determine, by the exercise of its own judgment or discretion, whether it is wise or unwise or whether it is good or bad policy to make the annexation. The Legislature could have clothed the board with such discretionary power, but it has not seen fit to do so. On the contrary, having complete control over the subject, the Legislature has determined in advance that the existence of the facts stated settles the question of the advisability of the annexation. The only function of the board is to see to it that the territory is located as the statute prescribes and that the petition is signed as the statute directs. It is quite manifest that the action of the board of trustees of a village under Section 1 is not such judicial action as will authorize a review of the proceedings by certiorari."

The rule of law is, where a court has jurisdiction of the subject matter and the parties, after the term ex-

pires at which the decree is entered, jurisdiction over the cause ceases, and the court has no power to go back and set it aside, but this rule has well recognized exceptions, one of which is the lack of jurisdiction—whether of the subject matter or of the parties—in which case the court has the right any time thereafter to go back and set the same aside as a mere nullity, and is so held by the Supreme Court of this State, in the case of the *City of Chicago v. J. Nodeck*, 202 Ill. 257, in which case the city of Chicago passed an ordinance and sought to enforce said ordinance, which required property owners to pay for a pavement for which they could not be assessed and for which a railroad company was bound to pay. The Court says:

“But, while the vacation of the judgment at a subsequent term after the collection of the assessment had been begun may not have been authorized by the terms of Section 56 of the Improvement Act, yet the rule that the Court has no power to set aside its judgment at a subsequent term is subject to several exceptions. One of these exceptions is that a court has power to vacate a judgment at any time after the expiration of the term at which it was rendered, where the court was without jurisdiction to enter such judgment (1 *Black on Judgments*, Sec. 307; *City of Olney v. Harvey*, 50 Ill. 453; *Orr v. Howard*, 4 Scam. 559). Inasmuch, therefore, as the original judgment of confirmation here under consideration was based upon such an ordinance as has already been described, the court was without jurisdiction to enter such judgment. This being so, the court has a right to vacate the judgment at a term subsequent to its entry.”

In the case of *Metzger Motor Car Company v. Parrott*, 233 U. S. 36, this was an action for personal injuries under a statute of the State of Michigan, which provided that the owner of a motor vehicle should be liable for any injury occasioned by the negligent operation by any person of such vehicle. The Court charged the jury that the recovery was exclusively under the statute. A transfer was taken from the State Court of Michigan to the Federal Court on the ground of diverse citizenship, resulting in a verdict and judgment for the plaintiff. After the trial of the case, the Supreme Court of Michigan held the statute void as in conflict with both the state and United States Constitutions, and Chief Justice White, in delivering the

opinion of the Supreme Court of the United States held,

“As the effect of the state decision on that subject is to determine that ab initio the statute was void, and as there was admittedly no right to recover in the absence of a valid statute, the obvious duty to reverse results.”

Here an absolute liability was imposed for damages by statute. The basis of liability was not brought into existence by any human action cooperating with the unconstitutional statute, liability was based solely and only upon the unconstitutional statute alone.

Likewise in the case now before us, the remedy given the appellees is based solely upon the Act of 1933. Without that Act the Circuit Court was without jurisdiction of the subject matter, and the subject matter was strictly of a legislative character and not inherently a judicial one. The scope of the judicial branch of government has to do with the present and the past, while the legislative marks out the course ahead for the future.

Appellees, in support of their contention that the error caused the invalidity of the statute in question was waived by the village in failing to take an appeal from the order in a direct proceeding and in support of this proposition, cite the case of the *People v. Gibbs*, 349 Ill. 83. The question of jurisdiction there was one of a personal nature, namely the permitting of women jurors to sit in the trial. The Court properly held that this was a privilege incident to such a mode of trial, and can be waived, although the statute permitting woman jurors to act had been held unconstitutional. The same question was raised in the case of the *People v. Hotchkiss*, 347 Ill. 217, cited by appellees.

Appellees cite a number of Township High School Organization Cases where the Organization Act was held unconstitutional and the legislature then passed a Validating Act which was retroactive and applied only to the districts where attempted organization took place prior to its passage. Those cases are not applicable here.

In the well-considered opinion of *Woods Brothers Construction Company v. Yankton County, South Dakota*, 54 Fed. 2nd 304, 81 A. L. R. 300, cited by appellees, the cause of action was based on a contract as well as the invalid statute, and the Court properly pointed out the difference in that the court inherently had jurisdiction in cases arising out of the contract, which is quite different from a case where the subject

matter is not judicial but legislative, and depends solely on an invalid statute.

The only remaining question in the case is that of fraud based on one of the appellees being a member of the Village Board of Warrensburg, together with the village not appearing and defending said application for disconnection of the territory in question. If the 1933 Act had been valid and the appellees came within the provisions of the Act, he would be entitled to the relief the same as any other property owner, and the fact that he was holding a village office would not disbar him from the remedy.

For the reason that the Circuit Court did not have jurisdiction of the subject matter except through the Act of 1933, and that Act having been held unconstitutional, we are required to reverse the Circuit Court of Macon County and remand the case with directions to that court to allow the application to vacate the order of March 20, 1934, and enter an order vacating said original order entered by said court on March 20, 1934.

Order reversed, cause remanded with directions.

Abstract

PUBLISHED IN ABSTRACT

Charles Beard, Plaintiff-Appellee, v. Pearl Moore,
doing business as Farm Power Machinery
Company, Defendant-Appellant.

Appeal from Circuit Court of Sangamon County.

Gen. No. 9183

302 I.A. 37

MR. JUSTICE HAYES delivered the opinion of the Court.

This is an appeal from the Circuit Court of Sangamon County, Illinois, on a judgment in favor of Charles Beard, plaintiff-appellee, hereinafter called plaintiff, against Pearl Moore, doing business as Farm Power Machinery Company, defendant-appellant, hereinafter called defendant, for the sum of three hundred (\$300.00) dollars.

On September 22, 1937, the plaintiff purchased from the defendant a 2-row corn picker and a power take off, on a conditional sales contract, for the sum of eight hundred (\$800.00) dollars, and made a payment of five hundred twelve and 50/100 (\$512.50) dollars in cash and gave a note for two hundred eighty-seven and 50/100 (\$287.50) dollars for the balance of the purchase price.

The complaint charges that the defendant, at the time of the sale, represented and warranted the said corn picker to be in first class mechanical condition, and that it would perform the service for which it was intended, i. e. the picking of corn in a proper and satisfactory manner. Complaint further alleges that it did not pick up corn as warranted; that plaintiff refused to pay said note, and that plaintiff notified defendant that the corn picker was not in good mechanical condition the first day he operated it.

The defendant, in his answer, admits that he sold the corn picker in question to the plaintiff, and alleges that the said corn picker would pick corn as warranted. This issue made on said pleading was tried by a jury, who found in favor of the plaintiff. The evidence shows that plaintiff had trouble with the corn picker from the start; that on a number of occasions throughout the fall of 1937 he complained to the defendant, and that the service man of the defendant came out and attempted to adjust the corn picker. The evidence shows

that the machine was leaving considerable corn in the field; that it was not taking the shucks off; and that it snapped the ears and threw them so they were left in the field. There was no evidence tending to show that after the service man of the defendant would adjust the machine that it would work any better after adjustment than it had before. There is no basis for a contention that the weight of the evidence is against the finding of the jury.

At the time plaintiff purchased the picker from the defendant, the clerk who sold him the machine was a man by the name of St. John, who was then on the sales floor of the defendant in his store in Springfield. Later St. John claimed to be the owner of the note given by the plaintiff for the balance of the purchase price, asserting he purchased it from the defendant. Early in December of the same year, St. John called on plaintiff and demanded payment of the note. Plaintiff asked him what he was going to do in regard to the corn picker, and stated he either wanted a new picker or his money refunded. Shortly thereafter defendant received a letter from plaintiff's attorney demanding the \$512.50 be paid back to plaintiff; the contract cancelled, and offered to surrender the corn picker upon refunding the money paid out. St. John, immediately after receiving the letter, repossessed the corn picker, and sold it for \$340.00. After deducting the amount due on the note, and paying the expenses of the sale, he forwarded \$2.40 to the plaintiff.

Defendant contends that it was incumbent upon the plaintiff to aver in his complaint and prove, upon the trial, that he had performed all the conditions on his part to be performed in accordance with his contract, or he should have alleged in his complaint an excuse for non-performance. The defendant did not test the sufficiency of the complaint by a motion to strike or otherwise, but joined issue by negating the facts averred in the complaint. Defendant further contends that judgment should be reversed on account of the failure of plaintiff to send a written notice by registered mail of the alleged trouble direct to the New Idea, Inc., Coldwater, Ohio, the manufacturer. The New Idea, Inc., was not a party to this suit, and not involved in the issue that was made up by the pleadings. The evidence discloses that from the time of the purchase until repossession, the defendant's repairmen and employees were endeavoring to make the picker work. The trouble came to a "head" early in December, when St. John attempted to collect the bal-

ance due. Although St. John claims to be merely the assignee of the note—having purchased it from the defendant—it appears that he was present on the floor of the defendant's store at the time the plaintiff went in to purchase the machine, and that he actually made the sale. As soon as demand was made for return of the down payment by the plaintiff, together with an offer to return the machine, St. John summarily took possession of the machine and foreclosed under the conditional sales contract. Although it is true that defendant and the New Idea, Inc., were not furnished with written notice of the complaint, it is also true that defendant, through his servants and employees, had full knowledge during October and November, 1937, of the troubles plaintiff had in operating the picker, and knew as much or more about it than plaintiff did. The formal sending of a notice through the mail would have been a useless and meaningless gesture. Failure to send such a notice in no respect harmed the defendant.

The sales contract was on a printed form, apparently furnished by the New Idea, Inc., on the back of which was printed the warranty over the printed name of the New Idea, Inc. Under the terms of this warranty, the New Idea, Inc., undertakes, in case of trouble, at its option, to replace the machine with a new one or take the machine back and refund the purchase price. If this suit was against the New Idea, Inc., the requirement of giving notice by registered mail after one day's trial to the New Idea, Inc., would be a condition precedent, but in the case at bar, the suit is against the vendor and not the manufacturer, and the giving of this notice to the manufacturer is immaterial under the issues made up by the pleadings.

The verdict of the jury is amply warranted by the evidence on the issues tried in the court below. Substantial justice has been done between the litigants in this cause. For the reasons herein set forth the judgment of the Circuit Court of Sangamon County is hereby affirmed.

Judgment Affirmed.

Abstract

PUBLISHED IN ABSTRACT

Nellie J. Ryan, Plaintiff-Appellant, v. O. N. Wilson,
R. R. Hess, as Sheriff of Edgar County,
Illinois, Defendants-Appellees.

Appeal from Circuit Court, Edgar County.

Gen. No. 9178

302 I.A. 37²

MR. JUSTICE FULTON delivered the opinion of the Court.

On the 28th day of April, A. D. 1938, Nellie J. Ryan, the Plaintiff-Appellant herein, filed her complaint against O. N. Wilson and R. R. Hess, as Sheriff of Edgar County, Illinois, the Defendants-Appellees, for an injunction restraining the said Defendants-Appellees from interfering with the property rights of the Plaintiff-Appellant.

The application for the restraining order is based upon the following facts:

On the 16th day of February, 1929, John M. Ryan and Carrie D. Ryan made, executed and delivered a quit-claim deed to their daughter Nellie J. Ryan covering certain farm land and residential property in Edgar County, Illinois; on the 14th day of May, 1929, O. N. Wilson, one of the Appellees herein, entered judgment by confession in the Circuit Court of said County against John M. Ryan, and obtained a judgment in the sum of \$4,273.63, and costs of suit; thereafter on the 11th day of June, 1929, the said John M. Ryan filed a motion to open up the judgment and for leave to defend the suit. The Court granted the motion but specifically provided that the execution, which had been issued upon said judgment, should be preserved as a lien upon the property of John M. Ryan, which included the premises in controversy in this case, until the final determination of the cause.

On the 22nd day of October, 1929, the Appellant Nellie J. Ryan, filed her quit-claim deed for record in the Recorder's Office of Edgar County. On the 21st day of February, 1930, a trial of the issues in the case of *Wilson v. Ryan* was had before a jury, and a verdict returned by the jury in favor of John M. Ryan. Thereafter, on the 11th day of March, 1930, the Appellee, O. N. Wilson filed his motion for a new trial of said cause and the motion was allowed. No affirmative ac-

tion of any kind was had in said cause from March 11th, 1930, until the 15th day of December, 1937, at which time John M. Ryan was served with notice that O. N. Wilson would apply to the Circuit Court to have said cause of action set for trial. On January 7, 1938, the case was regularly called for trial and John M. Ryan failed to appear for the hearing. The Appellee O. N. Wilson introduced his proof and at the close of all the evidence the Court instructed the jury to find the issues for the said O. N. Wilson. The jury returned a verdict in accordance with said instructions and the judgment entered on May 14th, 1929, was reinstated and re-affirmed.

Execution was issued on said judgment on the 8th day of April, A. D. 1938, delivered to the Sheriff of Edgar County and service was had of said execution on John M. Ryan the same date. The Sheriff's return showed the service of said execution and the certificate of levy on John M. Ryan and covered the real estate in controversy in this suit. During all the times above mentioned the said Nellie J. Ryan lived in the residential property which was included in the quitclaim deed, together with her father John M. Ryan. The said Appellant Nellie J. Ryan paid all the taxes, repairs, insurance and installments upon mortgage indebtedness covering the property, after the date of her deed February 16, 1929.

Both parties agree and concede there is only one main fact in dispute, and that is the question of whether or not O. N. Wilson, the Defendant-Appellee, had notice of the transfer of the premises from John M. Ryan and wife to the Plaintiff-Appellant, Nellie J. Ryan. In support of her contention the Appellant relies upon the testimony of the witness Commodore Stafford who stated that he talked with O. N. Wilson, Appellee, in May, 1929, two or three days before the latter entered up his note in judgment and Wilson told him he understood that John M. Ryan had transferred his property. The Appellant denied having had any such conversation, and testified that he had no knowledge of the conveyance or transfer to Nellie J. Ryan at the time he secured his judgment on May 14, 1929. The conversation relied upon occurred about nine years previous to the trial and testimony of both witnesses is subject to close scrutiny as to positiveness. However, the trial court had the opportunity of seeing the witnesses on the stand and observing their behavior and demeanor, and it would be difficult for this Court to say that his judgment as to the truth of the

evidence submitted on this point was in error and this Court is not inclined to disturb the finding of the Court on that question of fact. The findings of the Trial Court will not be disturbed where the conclusion to be drawn depends on the credit of the witnesses. *Tolman v. Crane* 44 App. 237. *Caldwell v. Chicago City Ry. Co.* 211 App. 310.

It is urged by Appellant that she has been in possession of the land in controversy under claim and color of title for more than seven years and during all that period of time paid the taxes assessed against the said premises. However, Sec. 29 of Chap. 30 of Ill. Revised Statutes, 1937, State Bar Assn. Ed. provides as follows:

“All deeds, mortgages and other instruments of writing which are authorized to be recorded, shall take effect and be in force from and after the time of filing the same for record, and not before, as to all creditors and subsequent purchasers, without notice; and all such deeds and title papers shall be adjudged void as to all such creditors and subsequent purchasers, without notice, until the same shall be filed for record.”

She also contends that purchasers and incumbrancers are charged with constructive notice of the rights and claims of parties in possession. It is conceded that John M. Ryan, his wife and Nellie J. Ryan, the daughter, all lived together in the premises, both before and after the date of the conveyance. The Appellant admitted some knowledge of the fact that Appellee had instituted court proceedings against her father. Under these circumstances we believe the following principles of law apply to the facts in this case.

In the case of *Smith v. Willard*, 174 Ill. 546, it was held that one who has obtained a judgment against his debtor before the recording of a deed by which the debtor has transferred his title to a third party, occupies the same position as a subsequent purchaser without notice within the meaning of Sec. 29 of the Conveyance Act.

The mere voluntary repeated payment of taxes on land of another will not establish title in the party paying the taxes and consequently would not amount to notice of title in such tax payer. The law only charges a purchaser with notice of conveyance and incumbrances within the direct line of the title he is buying and nothing more. *Bittner v. Field*, 354 Ill. 215. In the case of *Cook v. Flatt*, 338 Ill. 428, the Court said:

“Appellants claim that after the deed was executed the wife was in possession of the premises conveyed and that this possession was equivalent to the recording of the deed. This contention is not sustained by the evidence. There is no evidence as to who was in possession either before or after the deed was executed, or that there was any change in possession sufficient to constitute notice to creditors.”

This Court held in the case of *McHarry v. Bowman*, 274 Ill. App. 487, that possession of property usually constitutes notice but the possession must be open, visible and exclusive. Other jurisdictions have held that where the record shows a husband and wife to own land as tenants in common, possession by the wife along with the husband as one family, is not of itself notice to a bona fide purchaser from the husband of any claim on the part of a wife to sole ownership. *Schumacher v. Truman*, 134 Cal. 430.

Upon a consideration of the entire record we are of the opinion that the decree of the lower Court is correct and should be affirmed.

Degree Affirmed.

THE
JOURNAL
OF
THE
ROYAL ANTHROPOLOGICAL INSTITUTE
VOLUME 10
PART 1
1880

THE
JOURNAL
OF
THE
ROYAL ANTHROPOLOGICAL INSTITUTE
VOLUME 10
PART 1
1880

302 I.A. 69

40309

IN RE PETITION OF EDWARD WHITE,
Insolvent Debtor.

EDWARD WHITE,
Appellant,

v.

MOSES O. YOUNGBLOOD,
Appellee.

APPEAL FROM COUNTY COURT,
COOK COUNTY.

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Moses O. Youngblood obtained a judgment in tort in the Superior court of Cook county against Edward White for \$20,000, and a writ of capias ad satisfaciendum issued on the judgment. White was arrested and committed to the Cook county jail. After his commitment he sought his discharge in the County court under the Insolvent Debtors' Act, but judgment was there rendered dismissing his petition and he was remanded to the custody of the sheriff. An appeal was prosecuted from that judgment to the Supreme court of Illinois. An opinion was filed by that court on December 17, 1937 (White v. Youngblood, 367 Ill. 632), holding that no constitutional question was presented, and transferring the appeal to this court.

As ground for reversal in the Supreme court White urged (1) that section 5 of the Judgments, Decrees & Executions Act as applied to the petitioner is unconstitutional and void, in that an assault is a criminal offense against the laws of the state and must be prosecuted by indictment, information or presentment, as required by the Illinois constitution; (2) that the capias ad satisfaciendum was prematurely issued, and is void; and (3) that malice was not the gist of the action in the Superior court of Cook county, where the judgment was rendered upon which the capias was issued, and that consequently the capias was not authorized by

93-41308

50204

IN RE: WILLIAM W. HARRIS, JR.
DECEASED

* 503 090 14710411.

© 2004, Elsevier B.V.

2008-11-09

APPROX.

• 101000

THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA, IN

the appeal to this court, that no constitutional question was presented, and transferring on December 14, 1937 White v. Youngblood, 107 Ill. 521, 522, Supreme Court of Illinois. An opinion was filed by that court shortly. An appeal was prosecuted from that judgment to the sheriff. His petition and he was returned to the custody of the the Insolvent Debtors' Act, but judgment was there rendered dis- his commitment he sought his discharge in the County Court under White was arrested and committed to the Cook County Jail. After and a writ of habeas corpus issued on the judgment. Superior Court of Cook County against White for \$25,000. Moses O. Youngblood obtained a judgment in tort in the

[illegible]

law.

The Supreme court disposed of the first of these contentions by holding that when only the construction or application of a statute is in question, its validity is not involved, and that the court will not take jurisdiction merely for the purpose of construing the statute. It was also held that the Supreme court will not entertain an appeal or writ of error for the purpose of passing upon a constitutional question which has been previously settled.

With reference to the charge that malice was not the gist of the action, it appears that upon the trial in the Superior court, wherein judgment was rendered against White, a special interrogatory was submitted to the jury, as follows: "Did the defendant, Edward White, on November 17, 1934, wilfully, wantonly, intentionally and maliciously assault the plaintiff, Moses O. Youngblood?" which was answered by the jury in the affirmative. The Supreme court in its opinion in White v. Youngblood, supra, sets forth this interrogatory and the jury's answer thereto, and then answers White's present contention that malice was not the gist of the action as follows: (pp. 633, 634): "In the proceeding in the county court that court recited the finding of the jury in the superior court action that White was guilty of malicious conduct. That issue was settled in the superior court. (Lipman v. Goebel, 357 Ill. 315.) The county court held that malice was the gist of the action in the superior court and it remanded White to the custody of the sheriff."

It appears from the record that White's alleged assault upon Youngblood which constituted the basis for the tort judgment obtained in the Superior court afterward became the subject of a prosecution in the Municipal court of Chicago and in the Criminal court of Cook county, and in both instances White was found not guilty of the assault charged on the date mentioned, and it was asserted on appeal to the Supreme court that by reason of the findings and judgment of not guilty in these two proceedings, Youngblood was precluded from raising the same issue in the tort action in the Superior court.

The Supreme Court disposed of the first of these contentions by holding that when only the constitution or application of a statute is in question, its validity is not involved, and that the court will not take jurisdiction merely for the purpose of construing the statute. It was also held that the Supreme Court will not entertain an appeal or writ of error for the purpose of passing upon a constitutional question which has been previously settled.

With reference to the charge that malice was not the gist of the action, it appears that upon the trial in the superior court, wherein judgment was rendered against White, a special interrogatory was submitted to the jury, as follows: "Did the defendant, Edward White, on November 17, 1914, unlawfully, wantonly, intentionally and maliciously assault the plaintiff, Moses O. Youngblood?" which was answered by the jury in the affirmative. The Supreme Court in its opinion in White v. Youngblood, 211 Ill. 271, 272, took this interrogatory and the jury's answer thereon, and from these facts found that the gist of the action was not the gist of the action as follows: (pp. 633, 634): "In the proceeding in the county court that court recited the finding of the jury in the superior court action that White was guilty of malicious conduct. That issue was settled in the superior court. (White v. Youngblood, 211 Ill. 271, 272.) The county court held that malice was the gist of the action in the superior court and it recommended White to the custody of the sheriff."

It appears from the record that White's alleged assault upon Youngblood which constituted the basis for the tort judgment obtained in the Superior Court afterward became the subject of a prosecution in the Municipal Court of Chicago and in the Criminal Court of Cook County, and in both instances White was found not guilty of the assault charged on the date mentioned, and it was asserted on appeal in the Superior Court that by reason of the findings and judgment of the Criminal Court in these two proceedings, Youngblood was precluded from asserting the same issue in the tort action in the Superior Court.

In reply to this contention the Supreme court in White v. Youngblood, (p. 634) held: "An acquittal of a criminal charge is no defense to a civil suit for the same matter. (People v. Small, 319 Ill. 437; Corbley v. Wilson, 71 Ill. 209; 2 Van Fleet's Former Adjudication, sec. 485.) The Superior court had jurisdiction of the tort action." The Supreme court also said: "By filing his petition for discharge in the county court the petitioner recognized the validity of the process under which he was seized and imprisoned. The petitioner had his remedy in the suit in the superior court. He cannot raise the question collaterally in the county court proceeding. (Lipman v. Goebel, 357 Ill. 315.)"

The remaining contention made in the Supreme court and here is that the capias ad satisfaciendum was prematurely issued and void. It is argued that section 5 of the Judgments, Decrees & Executions Act, as amended in 1935 (Laws of 1935, p. 937) specifically prohibited the issuance of a body execution until after "the defendant shall have refused to deliver up his estate for the benefit of his creditors;" that the imprisonment of a person in a civil suit "for his refusal to deliver up his estate for the benefit of his creditors" is for the wrong or refusal to deliver up his estate for the benefit of his creditors in the manner prescribed by law; and that a personal demand upon the judgment debtor that he turn over all his property, not exempt from execution, to satisfy the execution and demand, is necessary to be made by the officer having authority to make the demand, and that a refusal by the judgment debtor to comply with the request is necessary before a body execution is authorized to issue. With reference to this contention the Supreme court in White v. Youngblood made the following comment (p. 635): "It is argued that by reason of this amendment a demand for the surrender of the debtor's property is made necessary. Section 5 excepted from its operation executions upon judgments obtained for torts. Whether the amended section has a different meaning now than formerly requires only the construction of the statute. When only the construction or application of a statute is in question its validity is not involved. (Standard Motors Securities Corp. v. Yates

In reply to this contention the Supreme Court in White v. Kansas, 191 U.S. 171, 23 S.Ct. 313, 50 L.Ed. 101 (1904) held: "An admission of a criminal charge is no defense to a civil suit for the same matter." (Prosser v. Smith, 319 Ill. 437, 118 N.E. 271 (1917).)

The Superior Court had jurisdiction of the tort action. The Supreme Court also said: "By failing to deliver the property in the county court the petitioners recommended the validity of the present action and the petitioners were not injured. The petitioners had no remedy in the county court proceeding." (Wright v. Goodell, 327 Ill. 515, 121 N.E. 271 (1917).)

The remaining question was in the Superior Court and was decided in that the Superior Court was properly bound and valid.

It is argued that section 5 of the Judgment, Decree & Execution Act, as amended in 1935 (laws of 1935, p. 937) specifically prohibited the issuance of a body execution until after "the defendant shall have returned to deliver up his estate for the benefit of his creditors;"

That the imprisonment of a person in a civil suit "for his refusal to deliver up his estate for the benefit of his creditors" is for the purpose or refusal to deliver up his estate for the benefit of his creditors in the manner prescribed by law; and that a personal demand upon the judgment debtor that he turn over all his property, not exempt from execution, to satisfy the execution and demand, is necessary to be made by the officer having authority to make the demand, and that a refusal of the judgment debtor to comply with the request is necessary before a body execution is authorized to issue. With reference to this contention the Supreme Court in White v. Kansas made the following comment: (White v. Kansas, 191 U.S. 171, 23 S.Ct. 313, 50 L.Ed. 101 (1904).)

"It is argued that by reason of this amendment a demand for the turnover of the debtor's property is made necessary, without which the execution cannot be obtained upon judgments obtained for the same matter."

Whereas the amended section has a different meaning now than formerly, requiring only the satisfaction of the statute, and not the making of a demand of a return of a return to the creditor in the county court.

The petitioners were not injured. The petitioners had no remedy in the county court proceeding. (Wright v. Goodell, 327 Ill. 515, 121 N.E. 271 (1917).)

The remaining question was in the Superior Court and was decided in that the Superior Court was properly bound and valid.

It is argued that section 5 of the Judgment, Decree & Execution Act, as amended in 1935 (laws of 1935, p. 937) specifically prohibited the issuance of a body execution until after "the defendant shall have returned to deliver up his estate for the benefit of his creditors;"

That the imprisonment of a person in a civil suit "for his refusal to deliver up his estate for the benefit of his creditors" is for the purpose or refusal to deliver up his estate for the benefit of his creditors in the manner prescribed by law; and that a personal demand upon the judgment debtor that he turn over all his property, not exempt from execution, to satisfy the execution and demand, is necessary to be made by the officer having authority to make the demand, and that a refusal of the judgment debtor to comply with the request is necessary before a body execution is authorized to issue. With reference to this contention the Supreme Court in White v. Kansas made the following comment: (White v. Kansas, 191 U.S. 171, 23 S.Ct. 313, 50 L.Ed. 101 (1904).)

"It is argued that by reason of this amendment a demand for the turnover of the debtor's property is made necessary, without which the execution cannot be obtained upon judgments obtained for the same matter."

Whereas the amended section has a different meaning now than formerly, requiring only the satisfaction of the statute, and not the making of a demand of a return of a return to the creditor in the county court.

The petitioners were not injured. The petitioners had no remedy in the county court proceeding. (Wright v. Goodell, 327 Ill. 515, 121 N.E. 271 (1917).)

The remaining question was in the Superior Court and was decided in that the Superior Court was properly bound and valid.

It is argued that section 5 of the Judgment, Decree & Execution Act, as amended in 1935 (laws of 1935, p. 937) specifically prohibited the issuance of a body execution until after "the defendant shall have returned to deliver up his estate for the benefit of his creditors;"

That the imprisonment of a person in a civil suit "for his refusal to deliver up his estate for the benefit of his creditors" is for the purpose or refusal to deliver up his estate for the benefit of his creditors in the manner prescribed by law; and that a personal demand upon the judgment debtor that he turn over all his property, not exempt from execution, to satisfy the execution and demand, is necessary to be made by the officer having authority to make the demand, and that a refusal of the judgment debtor to comply with the request is necessary before a body execution is authorized to issue. With reference to this contention the Supreme Court in White v. Kansas made the following comment: (White v. Kansas, 191 U.S. 171, 23 S.Ct. 313, 50 L.Ed. 101 (1904).)

"It is argued that by reason of this amendment a demand for the turnover of the debtor's property is made necessary, without which the execution cannot be obtained upon judgments obtained for the same matter."

Whereas the amended section has a different meaning now than formerly, requiring only the satisfaction of the statute, and not the making of a demand of a return of a return to the creditor in the county court.

The petitioners were not injured. The petitioners had no remedy in the county court proceeding. (Wright v. Goodell, 327 Ill. 515, 121 N.E. 271 (1917).)

The remaining question was in the Superior Court and was decided in that the Superior Court was properly bound and valid.

It is argued that section 5 of the Judgment, Decree & Execution Act, as amended in 1935 (laws of 1935, p. 937) specifically prohibited the issuance of a body execution until after "the defendant shall have returned to deliver up his estate for the benefit of his creditors;"

That the imprisonment of a person in a civil suit "for his refusal to deliver up his estate for the benefit of his creditors" is for the purpose or refusal to deliver up his estate for the benefit of his creditors in the manner prescribed by law; and that a personal demand upon the judgment debtor that he turn over all his property, not exempt from execution, to satisfy the execution and demand, is necessary to be made by the officer having authority to make the demand, and that a refusal of the judgment debtor to comply with the request is necessary before a body execution is authorized to issue. With reference to this contention the Supreme Court in White v. Kansas made the following comment: (White v. Kansas, 191 U.S. 171, 23 S.Ct. 313, 50 L.Ed. 101 (1904).)

"It is argued that by reason of this amendment a demand for the turnover of the debtor's property is made necessary, without which the execution cannot be obtained upon judgments obtained for the same matter."

Whereas the amended section has a different meaning now than formerly, requiring only the satisfaction of the statute, and not the making of a demand of a return of a return to the creditor in the county court.

The petitioners were not injured. The petitioners had no remedy in the county court proceeding. (Wright v. Goodell, 327 Ill. 515, 121 N.E. 271 (1917).)

The remaining question was in the Superior Court and was decided in that the Superior Court was properly bound and valid.

It is argued that section 5 of the Judgment, Decree & Execution Act, as amended in 1935 (laws of 1935, p. 937) specifically prohibited the issuance of a body execution until after "the defendant shall have returned to deliver up his estate for the benefit of his creditors;"

That the imprisonment of a person in a civil suit "for his refusal to deliver up his estate for the benefit of his creditors" is for the purpose or refusal to deliver up his estate for the benefit of his creditors in the manner prescribed by law; and that a personal demand upon the judgment debtor that he turn over all his property, not exempt from execution, to satisfy the execution and demand, is necessary to be made by the officer having authority to make the demand, and that a refusal of the judgment debtor to comply with the request is necessary before a body execution is authorized to issue. With reference to this contention the Supreme Court in White v. Kansas made the following comment: (White v. Kansas, 191 U.S. 171, 23 S.Ct. 313, 50 L.Ed. 101 (1904).)

"It is argued that by reason of this amendment a demand for the turnover of the debtor's property is made necessary, without which the execution cannot be obtained upon judgments obtained for the same matter."

Whereas the amended section has a different meaning now than formerly, requiring only the satisfaction of the statute, and not the making of a demand of a return of a return to the creditor in the county court.

The petitioners were not injured. The petitioners had no remedy in the county court proceeding. (Wright v. Goodell, 327 Ill. 515, 121 N.E. 271 (1917).)

The remaining question was in the Superior Court and was decided in that the Superior Court was properly bound and valid.

Co., 337 Ill. 250.) This court does not take jurisdiction merely for the purpose of construing statutes. (Cooper v. Palais Royal Theatre Co., 320 Ill. 44.

"The Insolvent Debtors act relating to the procedure for a debtor's discharge in a civil action when malice is not the gist of the action has not been amended. (Ill. Rev. Stat. 1937, p. 1779.) When malice is the gist of the action the act may not be invoked. We recently held that in a tort action based on malice the writ of capias ad satisfaciendum may be obtained on a judgment against a defendant without an execution being issued to require him to deliver his property. In re Blacklidge, 359 Ill. 482."

In In re Blacklidge, supra, the defendant likewise contended that a writ of capias ad satisfaciendum would not issue against the defendant without an execution being first issued requiring her to deliver up her property, but the court held against that contention, saying (pp. 486, 487) that "in such case, the person arrested and imprisoned is not entitled to be released upon the surrender of his property. (Lipman v. Goebbel, 357 Ill. 315; In re Mullin et al., 118 Ill. 551.) The plain intent of section 2 of the Insolvent Debtors act is to afford the debtor arrested on a capias under chapter 77 an opportunity to show in the county court that malice was not the gist of the action. In this case Mrs. Blacklidge did not seek to prove that malice was not the gist of the original action and elected to submit her petition solely upon the declaration in that action." The same may be said of the proceeding at bar.

Subsequent to the filing of the opinion in the White v. Youngblood case by the Supreme court, White filed a petition for rehearing, which was denied by that court on February 3, 1938. The cause having been transferred to this court, was subsequently argued orally before us, and in the course of the argument we pointed out that the Supreme court in its opinion had resolved all White's contentions adversely to him. Mr. Richard E. Westbrooks, representing White, replied that the Supreme court had exceeded its usual practice

604, 337 Ill. 290.) This court does not take jurisdiction merely for the purpose of construing statutes. (Gosper v. White, 1937, 337 Ill. 290.)

"The insolvent debtors act relating to the procedure for a debtor's discharge in a civil action when notice is not the gist of the action has not been amended. (Ill. Rev. Stat. 1937, p. 1978.)

involved. We recently held that in a tort action based on notice the writ of certiorari may be obtained on a judgment against a defendant without an execution being issued to require him to deliver his property. In re Blackledge, 337 Ill. 432."

In re Blackledge, supra, the defendant likewise contended that a writ of certiorari would not issue against the defendant without an execution being first issued requiring her to deliver up her property, but the court held against that contention, saying (p. 432, 433) that "in such cases, the person arrested and imprisoned is not entitled to be released upon the surrender of his property. (Lisman v. Gosper, 337 Ill. 311; In re White, 337 Ill. 521.) The plain intent of section 2 of the Insolvent Debtors act is to afford the debtor arrested on a capias under chapter 77 an opportunity to show in the county court that notice was not the gist of the action. In such case, the court is not to seek to prove that notice was not the gist of the original action and elected to admit her petition solely upon the declaration in that action." The same may be said of the proceeding at bar.

Subsequent to the filing of the opinion in the White case by the Supreme court, White filed a petition for rehearing, which was denied by that court on February 2, 1938. The case having been transferred to this court, was subsequently argued orally before us, and in the course of the argument we pointed out that the Supreme court in its opinion had resolved all White's contentions adversely to him. Mr. Richard E. Westbrooke, representing White, advised that the Supreme court had awarded its usual practice

when a case is transferred from that court to the appellate court on the ground that no constitutional question was involved, by also disposing of the other questions in the case, and we agreed to hold our decision in abeyance until Mr. Westbrook could file a motion in the Supreme court asking it to modify its opinion so as to delete therefrom adjudications of the various other points urged as ground for reversal. Such a motion was afterward filed in the Supreme court by Mr. Westbrook, and denied. Under the circumstances we are of the opinion that the judgment of the County court should be affirmed, and it is so ordered.

JUDGMENT AFFIRMED.

Sullivan, P. J., and Scanlan, J., concur.

40505

RUTH L. HEINICHEN, administratrix
of the estate of Clara Heinichen,
deceased,

Appellee,

v.

LYLE ADIN EVANS,

Appellant.

APPEAL FROM CIRCUIT
COURT, COOK COUNTY.

302 I.A. 70

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Ruth L. Heinichen, as administratrix of the estate of Clara Heinichen, deceased, brought suit for personal injuries alleged to have caused the death of her intestate as the result of an automobile collision between an automobile driven by intestate's husband, in which she was a passenger, and another automobile owned and driven by the defendant, Evans. The jury returned a verdict for \$4,000, upon which judgment was entered and defendant appeals.

The complaint consisting of four counts, the third of which was dismissed by plaintiff upon trial, charged defendant with negligence, wilful and wanton conduct and with violation of the statute requiring the sounding of warning by the driver of an automobile. Defendant denied these charges and averred affirmatively that the accident was caused by the negligence of plaintiff's intestate and by the wilful and wanton conduct of her husband, August F. Heinichen.

Upon hearing special interrogatories were submitted to the jury asking whether the conduct of plaintiff and defendant as shown by a preponderance of the evidence was of such reckless character as to amount to wilful and wanton misconduct. The jury's answer to these interrogatories indicated that it was of the opinion that neither the intestate nor her husband were guilty of wilful and wanton mis-

STATE OF NEW YORK
COUNTY OF ALBANY

3021 A. 70

IN SENATE,
JANUARY 1, 1911.

REPORT
OF THE

COMMISSIONER

MR. JUSTICE WHITNEY DELIVERED THE OPINION OF THE COURT.

Math I. Weinman, as administrator of the estate of
Vera Weinman, deceased, brought suit for personal injuries
alleged to have caused the death of her intestate as the result
of an automobile collision between an automobile driven by
intestate's husband, in which she was a passenger, and another
automobile owned and driven by the defendant, James. The jury
returned a verdict for \$10,000, with which judgment was entered
and defendant appeals.

The complaint consisting of four counts, the third of
which was dismissed by stipulation upon verdict, charged defendant
with negligence, willful and wanton conduct and with violation of
the statute requiring the carrying of license by the driver of an
automobile. Defendant denied these charges and asserted affirmatively
that the accident was caused by the negligence of plaintiff's hus-
band and by the willful and wanton conduct of her husband, James P.
Weinman.

Upon hearing special interrogatories were submitted to the
jury asking whether the conduct of plaintiff and defendant as shown
by a preponderance of the evidence was of such reckless character as
to amount to willful and wanton misconduct. The jury's answer to these
interrogatories indicated that it was of the opinion that neither
the intestate nor her husband were guilty of willful and wanton mis-

conduct but that defendant was so guilty.

It may be conceded to be an elementary principle of law in this state that if a plaintiff contributes as an approximate cause to his own injury then he cannot recover, even though the defendant was negligent. Inasmuch, however, as the special interrogatories relating to the wilful and wanton misconduct of the two parties were answered adversely to defendant, the question of plaintiff's intestate's contributory negligence or that of her husband, August F. Heinichen, would not constitute a defense, and indeed defendant's counsel admit "that if the evidence in this regard is sufficient to hold the defendant guilty of wilful, wanton and malicious misconduct, and assuming further that August F. Heinichen was not guilty of wilful and wanton misconduct, then the contributory negligence of August F. Heinichen would not be a defense under the doctrine of contributory negligence." Under the circumstances the two principal questions submitted for determination are whether the verdict of the jury in answering the special interrogatories adversely to defendant on the question of wilful and wanton misconduct of the respective parties can be sustained by the record, and whether the court erred in giving certain of plaintiff's instructions of which defendant complains, and in refusing to give several instructions tendered by defendant.

From the essential facts it appears that August F. Heinichen and the intestate, Clara Heinichen, were driving a Chrysler automobile east on 16th street in the City of Berwyn on June 15, 1936. Mr. Heinichen was at the wheel and intestate was seated beside him at his right. The collision occurred about eight o'clock in the evening of a clear dry day, while it was still light. Both 16th street and Wesley avenue, which intersects it, were streets approximately 30 feet wide from curb to curb. The southwest corner of the intersection was improved with several buildings, the east line of which was 35 feet from the corner. This space of 35 feet was vacant. The alley south

conceded that defendant was not guilty.

It may be conceded to be an elementary principle of law in this state that if a plaintiff contributes to an accident causing to his own injury then he cannot recover, even though the defendant was negligent. Inasmuch, however, as the special interrogatories relating to the willful and wanton misconduct of the two parties were answered adversely to defendant, the question of plaintiff's negligence contributory negligence or that of her husband, August W. Heinichen, would not constitute a defense, and further defendant's counsel could not object to the evidence in this regard is sufficient to hold the defendant guilty of willful, wanton and malicious misconduct, and concluding further that August W. Heinichen was not guilty of willful and wanton misconduct, then the contributory negligence of August W. Heinichen would not be a defense under the doctrine of contributory negligence. Under the circumstances the two principal questions submitted for determination are whether the verdict of the jury in answering the special interrogatories adversely to defendant on the question of willful and wanton misconduct of the respective parties can be sustained by the record, and whether the court erred in giving certain of plaintiff's instructions of which defendant complains, and in refusing to give several instructions tendered by defendant.

From the essential facts it appears that August W. Heinichen and the intestate, Clara Heinichen, were driving a Buick automobile east on 18th street in the City of Berwyn on June 15, 1936. Mr. Heinichen was at the wheel and intestate was seated beside him on his right. The collision occurred about eight o'clock in the evening of a clear dry day, while it was still light. Both cars were on May avenue, which intersects it, were streets approximately 50 feet wide from curb to curb. The southwest corner of the intersection was improved with several buildings, the east line of which was 35 feet from the corner. This space of 35 feet was vacant. The May south

of 16th street was 126 feet south of the sidewalk. There is some conflict in the evidence as to the respective speeds of the two automobiles. Mr. Heinichen, on behalf of plaintiff, testified that he was driving his car about 20 to 25 miles an hour before reaching the intersection in question. As he passed the building on the south side of 16th street his view was obstructed to the south until he reached the east line of the buildings, at which time he looked south, and could see in a southerly direction beyond the alley, possibly 140 feet. He testified that there was no automobile in view at that time. However, two other witnesses, Jacob Zarobinski and Samuel L. Miller, both testified that they were driving west on 16th street and were about 50 feet east of Wesley avenue when Heinichen was about the same distance west of Wesley avenue. They both had a clear view to the south and saw defendant's automobile about 200 feet away, approaching at a speed ranging from 50 to 60 miles an hour. They brought their car to a stop as a matter of caution, because they saw defendant's car approaching. One James Novak, who lived in the vicinity, was standing in the vacant lot at the northwest corner with his dog and had a clear view of both cars. He said that Heinichen's car, going east on 16th street, was proceeding at about 20 miles an hour, and defendant's automobile, going north on Wesley avenue, was being driven between 40 and 45 miles an hour. When he first saw defendant's car coming from the south it was south of the alley, which he estimated to be about 150 to 175 feet from 16th street, and Heinichen's car, proceeding eastward, was passing the grocery store on the south side of 16th street, about 35 feet from the intersection. All three of these witnesses stated that defendant's automobile did not slow up at any time, but came straight ahead at an excessive rate of speed and struck Heinichen's automobile on the right rear side as it was clearing the east side of Wesley avenue.

Witnesses testifying on behalf of defendant were the defendant,

of 14th street was 186 feet south of the sidewalk. There is some conflict in the evidence as to the respective speeds of the two automobiles. Mr. Heinichen, on behalf of Plaintiff, testified that he was driving his car about 30 to 35 miles an hour before reaching the intersection in question. As he passed the building on the south side of 14th street his view was obstructed so the south wall he reached the east line of the building, at which time he looked south, and could see in a westerly direction beyond the alley, possibly 140 feet. He testified that there was no automobile in view at that time. However, two other witnesses, Jacob Karshenfeld and Edward H. Miller, both testified that they were driving west on 14th street and were about 50 feet east of Wesley Avenue when Heinichen was about the same distance west of Wesley Avenue. They both had a clear view to the south and saw defendant's automobile about 500 feet away, approaching at a speed ranging from 30 to 35 miles an hour. They testified that car is a light blue color, a Buick model 1927. New defendant's car approaching. One James Hovick, who lived in the vicinity, was standing in the street at the intersection at that time. His dog and had a clear view of both cars. He said that Heinichen's car, going east on 14th street, was proceeding at about 30 miles an hour, and defendant's automobile, going north on Wesley Avenue, was being driven between 40 and 45 miles an hour. When he first saw defendant's car coming from the south it was south of the alley, which he estimated to be about 180 to 175 feet from 14th street, and Heinichen's car, proceeding eastward, was passing the grocery store on the south side of 14th street, about 35 feet from the intersection. All three of these witnesses stated that defendant's automobile did not slow up at any time, but came straight ahead at an excessive rate of speed and struck Heinichen's automobile on the right rear side as it was clearing the east side of Wesley Avenue.

Witnesses testifying on behalf of defendant were the defendant,

who was driving his car at the time of the collision, his wife, Amelia Evans, A. W. Larson and his wife, Ethel, all of whom were passengers in defendant's car. Mrs. Evans stated that when she first saw the eastbound automobile it was right in front of her, and Mrs. Larson's testimony was substantially to the same effect. Mr. Larson stated that when he first saw the eastbound car it was 75 feet from him, and that it appeared to be going 40 to 45 miles an hour; that when the cars collided Heinichen's car was about 6 feet from the south curb of 16th street, and that after the collision defendant's car was still in the intersection, 10 feet from the northeast curb. At or immediately preceding the impact, August F. Heinichen accelerated the speed of his car, evidently in an effort to avoid defendant's automobile which was approaching at right angles, and after the collision Heinichen's car proceeded on across Wesley avenue and on the north side of that street, traversing the distance up to Zarobinski's automobile, collided with it, then turned to the east and south, turned over, and finally came to rest, headed west on the south side of 16th street. Mrs. Heinichen was taken to the Berwyn Hospital, where it was found that she had bruises over her body and a severe cut on the left side of her head. She was later taken to her home, a paralysis on the right side of her body developed and she died at home on July 5. The attending physician was of the opinion that her death was caused by a hemorrhage due to the accident.

Without going into an extended discussion of the evidence of the various witnesses, it seems reasonably clear that the three disinterested persons who testified on behalf of plaintiff were in agreement that defendant's car came north on Wesley avenue at an excessive rate of speed, ranging from 40 to 60 miles an hour, without hesitating or stopping or sounding any warning, and that Heinichen on the other hand was proceeding in an easterly direction at a moderate

who was driving his car at the time of the collision. His wife, Amelia Evans, A. W. Larson and his wife, Ethel, all of whom were present in defendant's car. Mrs. Evans stated that when she first saw the eastbound automobile it was right in front of her, and Mrs. Larson's testimony was substantially to the same effect. Mr. Larson stated that when he first saw the eastbound car it was 75 feet from him, and that it appeared to be going 40 to 45 miles an hour; that when the cars collided Weinichen's car was about 6 feet from the south end of 14th street, and that after the collision defendant's car was still in the intersection, 10 feet from the northeast curb. At or immediately preceding the impact, August 7, Weinichen accelerated the speed of his car, evidently in an effort to avoid defendant's automobile which was approaching at right angles, and after the collision Weinichen's car proceeded on across Wesley avenue and on the north side of that street, traversing the distance up to Karolinski's automobile, collided with it, then turned to the east and south, turned over, and finally came to rest, facing west on the south side of 14th street. Mrs. Weinichen was taken to the Mercy Hospital, where it was found that she had bruises over her body and a severe cut on the left side of her head. She was later taken to her home, a paralytic on the right side of her body developed and she died at home on July 8. The attending physician was of the opinion that her death was caused by a hemorrhage due to the accident.

Without going into an extended discussion of the evidence of the various witnesses, it seems reasonably clear that the three disinterested persons who testified on behalf of plaintiff were in agreement that defendant's car came north on Wesley avenue at an excessive rate of speed, ranging from 40 to 50 miles an hour, without indicating or stopping or sounding any warning, and that Weinichen as the driver was proceeding in an easterly direction at a moderate

rate of speed and driving cautiously. The jury evidently considered the interest or lack of interest of the respective witnesses on the question of the conduct of the two drivers, and were of the opinion, as indicated by their answers to the special interrogatories, that plaintiff was not guilty of wilful and wanton misconduct, but that defendant was driving his car in such a reckless manner, immediately preceding and at the time of the accident, as to constitute wilfulness and wantonness. It was within the province of the jury to determine these questions of fact, and we cannot say that their verdict and answers to the respective interrogatories were against the manifest weight of the evidence.

In addition to the circumstances hereinbefore set forth, it appears from the evidence that at the intersection which defendant was approaching there was a large "Slow" sign painted on Wesley avenue, immediately south of 16th street, which had been freshly painted a few months before. The word "Slow" is set out in orange and black letters, 12 feet in height, flanked by 8 inch stripes 1 foot apart and occupying a space of 5 feet in all across the automobile lane. This should have been sufficient warning to defendant to slow down before coming to the intersection, and if as stated by disinterested witnesses testifying for plaintiff he crossed the intersection at the rate of 45 to 60 miles an hour without slowing down, the jury was justified in finding that this amounted to a reckless, wilful and wanton disregard of the rights of others.

The remaining question relates to the giving and refusal of certain instructions. We have carefully examined the instructions about which complaint is made, numbering eight in all, but find no convincing ground for reversal in any of them.

The jury assessed plaintiff's damages in the sum of \$4,000. This constituted compensation to a husband and five children for

rate of speed and driving cautiously. The jury evidently considered
of the interest or lack of interest of the respective witnesses
on the question of the conduct of the defendant, and was of the
opinion, as indicated by their answers to the special interrogatories,
that defendant was not guilty of willful and wanton misconduct, but
that defendant was driving his car in such a reckless manner,
immediately preceding and at the time of the accident, as to con-
stitute willfulness and wantonness. It was within the province of
the jury to determine these questions of fact, and we cannot say
that their verdict and answers to the respective interrogatories
were against the manifest weight of the evidence.

In addition to the circumstances heretofore set forth,
it appears from the evidence that at the intersection of
defendant was approaching from the south on a street known as
Lesley avenue, immediately south of 18th street, which had been
freshly painted a few months before. The word "slow" is set out
in orange and black letters, 12 feet in height, flanked by 8 inch
strips 1 foot apart and occupying a space of 2 feet in all, across
the automobile lane. This would have been sufficient warning to
defendant to slow down before coming to the intersection, and it
is stated by disinterested witnesses testifying for defendant that
crossed the intersection at the rate of 25 to 30 miles an hour.
without slowing down, the jury was justified in finding that this
amounted to a reckless, willful and wanton disregard of the rights
of others.

The remaining question relates to the giving and refusal
of certain instructions. We have carefully examined the instruc-
tions about which complaint is made, submitted with all the
other instructions, and find no convincing ground for reversal in any of them.
The jury returned defendant's damages in the sum of \$4,000.
This constituted compensation to a husband and five children for

the pecuniary injury sustained by them in the loss of deceased who was caring for the entire household. Defendant does not challenge the fairness of the amount of the verdict. The case was fairly tried and for the reasons given we are of opinion that the judgment of the Circuit court should be affirmed. It is so ordered.

JUDGMENT AFFIRMED.

Sullivan, P. J., and Scanlan, J., concur.

the primary injury sustained at the time of the explosion was
not owing to the entire destruction of the vessel, but to the
collapse of the mainmast at the bow. The mainmast was
broken and the vessel given to the opinion that the
of the vessel would be destroyed. It is so stated.

WITNESSES:

Witness, J. J. Lee, residing at 123 corner,

40638

GRAHAM McNAMEE, a minor, by
George F. McNamee, his father
and next friend,

Appellee,

v.

MARINUS LANENGA,

Appellant:

APPEAL FROM CIRCUIT COURT,
COOK COUNTY.

302 I.A. 71

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Marinus Lanenga, defendant, had leave to appeal from an order of the Circuit court granting a new trial in a suit at law wherein Graham McNamee, a minor, by George T. McNamee, his father and next friend, sought to recover damages for injuries sustained by plaintiff as the result of a collision with defendant's automobile. The jury returned a verdict in favor of defendant, whereupon the court promptly granted a new trial.

The facts, so far as they are essential to a consideration of the issues involved, disclose that the accident occurred June 10, 1936, at about 4:30 in the afternoon. Plaintiff, an infant of the age of six years, was struck by an automobile driven by defendant some two or three hundred feet south of Roosevelt road on 59th avenue, in Cicero, and severely injured. Defendant had driven west on Roosevelt road and turned south on 59th avenue, a residential street in Cicero. On the southeast corner of Roosevelt road and 59th avenue there was a school and a school yard that extended south to the alley in the middle of the block. Plaintiff's home was located just across the alley on the east side of 59th avenue. It was a clear day in June and the street was perfectly dry. At the time of the accident a game of baseball was being played by children in the school yard, and children were also playing in 59th avenue and on the sidewalk on the west side of the street close to the alley. A sign, bearing the legend,

1000

JOHN ROBERTS, JR.,
GEORGE F. ROBERTS, JR.,
and their firm,

attorneys

v.

WILLIAM LAMONGA,

defendant.

DOCK NO. 1.

802 I.A. 71

MR. JUSTICE PRINCE DELIVERED THE OPINION OF THE COURT.

William Lamonga, defendant, was leave to appeal from an order of the Circuit Court granting a new trial in a suit at law wherein Graham McNamee, a minor, by George F. McNamee, his father and next friend, sought to recover damages for injuries sustained by plaintiff as the result of a collision with defendant's automobile. The jury returned a verdict in favor of defendant, whereupon the court promptly granted a new trial.

The facts, so far as they are material in a consideration

of the issues involved, disclose that the accident occurred on 10, 1930, at about 4:30 in the afternoon. Plaintiff, an infant at the age of six years, was struck by an automobile driven by defendant some two or three hundred feet south of Roosevelt road on 25th avenue, in Chicago, and severely injured. Defendant had driven west on Roosevelt road and turned south on 25th avenue, a residential street in Chicago. On the southeast corner of Roosevelt road and 25th avenue there was a school and a school yard that extended south to the alley in the middle of the block. Plaintiff's home was located just across the alley on the east side of 25th avenue. It was a clear day in time and the street was perfectly dry. At the time of the accident a game of baseball was being played by children in the school yard, and children were also playing in 25th avenue and on the sidewalk on the west side of the street close to the alley. A sign, bearing the legend,

"Caution - School", was posted 25 feet south of Roosevelt road on 59th avenue. Plaintiff with two of his companions was playing in the parkway between the sidewalk and the curb, and as defendant's car approached he proceeded into the street, was struck by defendant's car and injured.

Defendant takes the position that the case was fairly tried, the jury properly instructed, the question of fact relating to defendant's negligence was fairly submitted to the jury and determined by it, and that the verdict was not against the manifest weight of the evidence.

Plaintiff's counsel contend that the preponderance of the evidence adduced upon the hearing was in favor of plaintiff as a matter of fact and law; that the verdict was against the manifest weight of the evidence; and that since the granting of a new trial was in the discretion of the trial court and will not be disturbed by the Appellate court except for a manifest abuse of the discretion, it was within the province of the trial court to set aside the verdict if he thought that it did not properly reflect the weight of the evidence.

The cause will in all probability have to be retried, and since we are not disposed to prejudice the cause of either party we refrain from commenting extensively on the evidence adduced at the trial. However, in justification of the court's order granting a new trial, it appears that three of plaintiff's witnesses, who were in a position to observe the events leading to the accident, all testified that defendant proceeded south at a rather high rate of speed to a point about 50 feet from where plaintiff was struck, at which time he suddenly applied his brakes and skidded in excess of 40 feet, struck plaintiff about 3 feet from the east curbstone, and then proceeded over the curbstone with his left front wheel, breaking a piece of the stone out of the curb. His right front headlight hit plaintiff, and the glass from the headlight was found

"Station - School", was posted 25 feet south of Roosevelt road on 95th Avenue. Plaintiff with two of his companions was playing in the parkway between the sidewalk and the curb, and as defendant's car approached he proceeded into the street, was struck by defendant's car and injured.

Defendant takes the position that the case was fairly tried, the jury properly instructed, the question of fact relating to defendant's negligence was fairly submitted to the jury and determined by it, and that the verdict was not against the manifest weight of the evidence.

Plaintiff's counsel contend that the preponderance of the evidence adduced upon the hearing was in favor of plaintiff as a matter of fact and law; that the verdict was against the manifest weight of the evidence; and that since the granting of a new trial was in the discretion of the trial court and will not be disturbed by the appellate court except for a manifest abuse of its discretion, it was within the province of the trial court to set aside the verdict if he thought that it did not properly reflect the weight of the evidence.

The cause will in all probability have to be retried, and since we are not disposed to prejudice the cause of either party we refrain from commenting extensively on the evidence adduced at the trial. However, in justification of the court's order granting a new trial, it appears that three of plaintiff's witnesses, who were in a position to observe the events leading to the accident, all testified that defendant proceeded south at a rather high rate of speed to a point about 75 feet from where plaintiff was struck, at which time he suddenly applied his brakes and skidded in excess of 40 feet, struck plaintiff about 3 feet from the east curbstone, and then proceeded over the sidewalk into the left hand lane, striking a piece of the stone out of the curb. His right front headlight hit plaintiff, and the glass from the headlight was found

after the accident about two or three feet from the east curb. Defendant denies he was driving at a high rate of speed, and it is also urged that some of plaintiff's witnesses were not in a position to see the accident. Nevertheless, the record clearly discloses that the circumstances would require great care in driving in a neighborhood where children were playing on the sidewalk and in the school yard, where the posted sign just south of Roosevelt road and the entire setting within close proximity of the accident indicated possible danger. Defendant testified that he did not see the sign and he admits that he did not blow his horn as he approached the place where he knew the children were. The extent of the skid marks, afterward measured and described by witnesses as being from 45 to 50 feet long, was a circumstance the trial court had the right to consider in determining the motion for a new trial.

The law is well settled that the granting of a new trial is a discretionary matter not disturbed by an appellate tribunal unless there is a manifest abuse of discretion, which must be affirmatively shown. (Berggen v. Travelers Insurance Co., 231 Mass. 173; Graeger v. Hager, 275 Mich. 363; Rossmann v. Newbon, 112 N. J. L. 261; Marks v. Brown, 138 Minn. 405.) The rule is well stated in Sharp v. Greene, 122 Wash. 677, cited in plaintiff's brief, wherein the court said (p. 689) quoting from Clifford v. Denver, S. P. & P. R. Co., 12 Colo. 128): "It [the rule] is based upon the theory that the judge who tries the case having the parties, their witnesses and counsel before him, with opportunity to observe their demeanor and conduct during the trial and to note all incidents occurring during its progress likely to affect the result thereof, is better qualified to judge whether a fair trial has been had and substantial justice done, than the appellate tribunal." We recently reached the same conclusion in Polischuk v. Vaughan et al., No. 40609 (not published), the opinion in which was filed concurrently with this cause. That case contains an exhaustive statement of the law applicable to the circumstances of this cause and cites numerous supporting decisions in various

After the accident about two or three feet from the east curb, defendant denies he was driving at a high rate of speed, and it is also urged that some of plaintiff's witnesses were not in a position to see the accident. Nevertheless, the record clearly discloses that the circumstances would require great care in driving in a neighborhood where children were playing on the sidewalk and in the school yard, where the posted sign just south of Roosevelt road and the entire setting within close proximity of the accident indicated possible danger. Defendant testified that he did not see the sign and he admits that he did not blow his horn as he approached the place where he knew the children were. The extent of the child marks afterward measured and described by witnesses as being from 45 to 75 feet long, was a circumstance the trial court had the right to consider in determining the motion for a new trial.

The law is well settled that the granting of a new trial is a discretionary matter not limited by an appellate tribunal unless there is a manifest error of law, which may be affirmatively shown. (Berkman v. Travelers Insurance Co., 231 Mass. 173; Green v. Board, 275 Mass. 587; Berkman v. Board, 111 N. E. 2d 1001; Green v. Board, 230 Mass. 407.) The rule is well stated in Green v. Board, 230 Mass. 407, 122 Mass. 677, cited in plaintiff's brief, wherein the court said (p. 689) quoting from Attorney v. Board, 231 Mass. 173, 120 N. E. 1001: "It [the rule] is based upon the theory that the judge who tries the case having the parties, their witnesses and counsel before him, with opportunity to observe their demeanor and conduct during the trial and to note all incidents occurring during its progress likely to affect the result thereof, is better qualified to judge whether a fair trial has been had and substantial justice done, than the appellate tribunal." He recently reached the same conclusion in Attorney v. Board, 231 Mass. 173, 120 N. E. 1001 (not qualified), the opinion in which was this: "The court is of opinion that the trial judge is in a better position to judge whether a fair trial has been had and substantial justice done, than the appellate tribunal." The statement of the law applicable to the circumstances of this case and cited numerous supporting decisions in various

jurisdictions. (See, also, Callas v. Public Taxi Service, Inc., 292 Ill. App. 399.)

In the case at bar no negligence could be imputed to plaintiff because of his age, and therefore the only question before the jury was whether or not defendant was guilty of negligence which proximately contributed to the injury. The trial court evidently believed that the verdict was against the manifest weight of the evidence and promptly granted a new trial. Therefore, under the well recognized rule of law we are not disposed to disturb the court's order, no showing having been made that there was an abuse of discretion by the trial judge.

The only other question argued by counsel in their briefs relates to the giving and refusal of several instructions. Inasmuch as any error that may have occurred in the giving or refusing of instructions will in all likelihood not be repeated, we consider it unnecessary to discuss them.

For the reasons given herein the judgment of the Circuit court in granting a new trial should be affirmed. It is so ordered.

JUDGMENT AFFIRMED.

Sullivan, P. J., and Friend, J., concur.

III. App. 299.

In the case at bar no negligence could be imputed to plaintiff because of his age, and therefore the only question before the jury was whether or not defendant was guilty of negligence which proximately contributed to the injury. The trial court withdrew the verdict was against the manifest weight of the evidence and properly granted a new trial. Therefore, under the well recognized rule of law we are not disposed to disturb the court's order, no showing having been made that there was an abuse of discretion by the trial judge. The only other question argued by counsel in their briefs related to the giving and refusal of several instructions. Inasmuch as any error that may have occurred in the giving or refusing of instructions will in all likelihood not be repeated, we consider it unnecessary to discuss them.

For the reasons given herein the judgment of the Circuit Court in granting a new trial should be affirmed. It is so ordered.

Sullivan, T. J. and Friend, J. J. 1950

40239

FRANK PATRYN, a minor, by
JOSEPH PATRYN, next friend,
Appellant,

v.

J. M. ZACCARIA,
Appellee.

APPEAL FROM CIRCUIT
COURT, COOK COUNTY.

302 I.A. 84

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

A suit to recover damages for injuries sustained by Frank Patryn, a minor. A jury returned a verdict finding the defendant not guilty and plaintiff appeals from a judgment entered upon the verdict.

At the time of the accident, September 1, 1936, the minor was crossing from the west side to the east side of Damen avenue at a point 100 feet north of where that avenue intersects Ohio street. Defendant was driving his automobile on Damen avenue in a northerly direction and at the time of the accident was straddling the east rail of the north bound street car tracks on that avenue. The complaint charges that defendant's automobile "ran into, upon and against plaintiff." The minor testified that as he crossed the street he was half walking and half running and that when he reached a point about two or three yards from the east curb of Damen avenue he got hit by an automobile but that he did not know what part of the automobile struck him. The only adult witness for plaintiff, Esther Miller, testified that as the automobile approached close to the boy it made a sudden swerve toward the northeast, and that she "did not see the boy and automobile come together because the body of the car hid my view from it." Defendant testified that it was drizzling and raining at the time of the accident and when he first saw the boy he was three to five feet away from the car

40231

FOR THE PLAINTIFF, a motion by
JOHN J. KELLY, JR., Attorney
at Law

APPEAL FROM CIRCUIT
COURT, JACKSONVILLE,
FLORIDA

J. M. MACGARRA,
Attorney

8021A.84

MR. JUSTICE SCAGGARD DELIVERED THE OPINION OF THE COURT.

A suit to recover damages for injuries sustained by
Frank Pappas, a minor. A jury returned a verdict finding the
defendant not guilty and plaintiff appeals from a judgment
entered upon the verdict.

At the time of the accident, September 1, 1936, the

minor was crossing from the west side to the east side of

Damen Avenue at a point 100 feet north of where that Avenue

intersects Ohio Street. Defendant was driving his automobile

on Damen Avenue in a northerly direction and at the time of the

accident was straddling the east rail of the north bound street

car tracks on that Avenue. The complaint charges that defend-

ant's automobile "ran into, upon and against plaintiff." The

minor testified that as he crossed the street he was half walking

and half running and that when he reached a point about two or

three yards from the east curb of Damen Avenue he got hit by an

automobile but that he did not know what part of the automobile

struck him. The only adult witness for plaintiff, Esther Miller,

testified that as the automobile approached close to the boy it

made a sudden swerve toward the northeast, and that she "did not

see the boy and automobile come together because the body of the

car hid my view from it." Defendant testified that it was

drizzling and raining at the time of the accident and when he

first saw the boy he was three to five feet away from the car

and was running across the street with his head down; that he, defendant, immediately applied the brakes and "stopped right there;" that the boy "bumped" into the side of defendant's car; that the boy was not in front of the front end of the car at any time. Plaintiff's as well as defendant's evidence shows that after the accident the boy was lying alongside of the left side of the automobile. Esther Miller testified that "the automobile did not go past him." While plaintiff claimed that it was a dry day, the overwhelming evidence, including a United States Weather Bureau report, shows that it was raining at the time. As plaintiff makes no contention in reference to the evidence it is unnecessary for us to refer to other testimony in the case.

But two points are raised by plaintiff: (1) "The right of plaintiff to a fair trial was prejudiced by the court's refusal to allow plaintiff to fully interrogate the jury." (2) "The trial court erred in giving six instructions submitted on behalf of the defendant."

We will first consider contention (2). It appears from the record that it is a custom of the judge who tried the instant case to call counsel into chambers at the close of the evidence to consider the instructions offered by both sides; that the instructions offered in the instant case were considered carefully by the court and counsel and that the trial court asked each counsel to point out any specific objection he had to any given instruction tendered by the other side; that plaintiff's counsel objected to only two instructions offered by defendant; that the court then started to give further consideration to these two instructions, whereupon plaintiff's counsel stated: "I believe I will get a verdict anyway and I would rather the court withdraw my objection to them." In view of what transpired at the time of the consideration of the instructions it would be a grave injustice to the trial court and the defendant to permit plaintiff to now contend that the trial court committed error in the giving of certain instructions.

As to point (1): Prior to the trial and before the jury

and was running across the street with his head down; that he, defendant, immediately applied the brakes and "stopped right there;" that the boy "bumped" into the side of defendant's car; that the boy was not in front of the front end of the car at any time. Plaintiff's as well as defendant's evidence shows that after the accident the boy was lying alongside of the left side of the automobile. Father Miller testified that "the automobile did not go past him." While plaintiff claimed that it was a dry day, the overwhelming evidence, including a United States Weather Bureau report, shows that it was raining at the time. As plaintiff makes no contention in reference to the evidence it is unnecessary for us to refer to other testimony in the case.

But two points are raised by plaintiff: (1) "The right of plaintiff to a fair trial was prejudiced by the court's refusal to allow plaintiff to fully interrogate the jury." (2) "The trial court erred in giving six instructions submitted on behalf of the defendant." We will first consider contention (2). It appears from the record that it is a custom of the judges who tried the instant case to call counsel into chambers at the close of the evidence to consider the instructions offered by both sides; that the instructions offered in the instant case were considered carefully by the court and counsel and that the trial court asked each counsel to point out any specific objection he had to any given instruction tendered by the other side; that plaintiff's counsel objected to only two instructions offered by defendant; that the court then started to give further consideration to these two instructions, whereupon plaintiff's counsel stated: "Believe I will get a verdict anyway and I would rather the court withdraw my objection to them." In view of what transpired at the time of the consideration of the instructions it would be a grave injustice to the trial court and the defendant to permit plaintiff to now contend that the trial court committed error in the giving of certain instructions.

was called to be interrogated on their voir dire examination plaintiff filed the following petition:

"Now comes the plaintiff by and through his attorney, and shows to the court that he has been informed that the above styled cause is being defended by the London Guarantee & Accident Co. Ltd., and that said company is vitally interested in said cause, and that he has been informed that the attorney who is actively defending the case is representing the insurance company in the matter, and that the claims attorneys of the aforesaid insurance company have discussed with counsel for the plaintiff the question of settlement of this cause.

"Wherefore plaintiff asks leave of court to interrogate the jurors on voir dire examination as to whether or not any of them have any financial interest in or have ever been employed by the London Guarantee & Accident Co. Ltd.

"M. J. Hannigan (Signed)
Attorney for Plaintiff

"State of Illinois)
County of Cook) SS

"Marion J. Hannigan, being first duly sworn, on oath deposes and says that he has read the foregoing petition by him subscribed, and that the matters and things set forth therein are true according to the best of his knowledge and belief.

"Marion J. Hannigan (Signed)"

(Jurat)

Before a jury was called an order was entered denying the prayer of the petition. It is fundamental law that the right to a trial by a fair and impartial jury includes the right to have the jurors sworn and examined as to their qualifications and that it is error for the trial court to deny this right if properly requested before the jury is sworn. Where a trial court denies this right to a party to a suit a serious question might arise as to whether or not a judgment in the particular case could stand, but the jurors in the instant case were interrogated upon their voir dire examination.

was called to be interrogated on their voir dire examination plain--

the following testimony:

"Now comes the plaintiff by and through his attorney, and shows to the court that he has been informed that the above styled cause is being defended by the London Guarantee & Accident Co. Ltd., and that said company is vitally interested in said cause, and that he has been informed that the attorney who is actively defending the case is representing the insurance company in the matter, and that the claims attorneys of the aforesaid insurance company have discussed with counsel for the plaintiff the question of settlement of this cause."

"Wherefore plaintiff asks leave of court to interrogate the jurors on voir dire examination as to whether or not any of them have any financial interest in or have ever been employed by the London Guarantee & Accident Co. Ltd."

"E. J. Hennigan, Plaintiff's Attorney for Plaintiff"

"State of Illinois }
County of Cook }

"Eaton J. Hennigan, being first duly sworn, on oath deposes and says that he has read the foregoing petition by him subscribed, and that the matters and things set forth therein are true according to the best of his knowledge and belief."

"Eaton J. Hennigan (Signed)"

(Jury)

Before a jury was called an order was entered denying the prayer of the petition. It is fundamental law that the right to a trial by a fair and impartial jury includes the right to have the jurors sworn and examined as to their qualifications and that it is error for the trial court to deny this right if properly requested before the jury is sworn. Where a trial court denies this right to a party to a suit a serious question might arise as to whether or not a judgment in the particular case would stand, but the jurors in the instant case were interrogated upon their voir dire examination."

The record, however, is silent as to the questions asked them, and is equally silent as to whether any peremptory challenges were exercised by plaintiff or defendant. For aught that appears in the record counsel for plaintiff may have been well satisfied with the twelve jurors sworn to try the case, at the time he accepted them. Indeed, it appears from the record that he was so satisfied he would "get a verdict anyway" that he withdrew his objection to certain instructions offered by defendant. In support of plaintiff's contention that the court erred in denying the prayer of his petition, the case of Smithers v. Henriquez, 368 Ill. 588, is cited. Defendant strenuously contends that the instant petition does not present nearly as strong a showing in support of the prayer as is disclosed in the Smithers case. While defendant's contention is not entirely without force, we think, under the ruling in the Smithers case, the trial court would have been justified had he permitted counsel for plaintiff to interrogate the jurors, in a circumspect way, to ascertain if they had any financial interest in or had ever been employed by the London Guarantee & Accident Co., Ltd. Defendant argues that the company in question is an English company and that it would be extremely unlikely that any juror had a financial interest in it, and that plaintiff's attorney did not, in the petition or in any oral statement to the trial court, make any claim that any of its stockholders resided in Cook county, Illinois; that the denial of the request in the petition for leave to interrogate the jurors as to whether they had ever been employed by the London Guarantee & Accident Co., Ltd., was not prejudicial because plaintiff's attorney had the right to question each juror in reference to his present and past employment and in this way ascertain if he was employed or had been employed by the Accident Company.

In Smithers v. Henriquez, supra, the court, after reviewing a number of cases in each of which the defendant contended that the trial court had committed reversible error in permitting plaintiff's counsel, during the examination of the jurors, to ask if any juror was interested in a certain insurance company - naming the company

The record, however, is silent as to the questions asked them, and is equally silent as to whether any preliminary challenges were exercised by plaintiff or defendant. Now again that appears in the record counsel for plaintiff may have been well satisfied with the twelve jurors sworn to try the case, at the time he accepted them. Indeed, it appears from the record that he was so satisfied he would "get a verdict anyway" that he withdrew his objection to certain instructions offered by defendant. In support of plaintiff's contention that the court erred in granting the petition, the law of Illinois, as stated in *Illinois v. ...*, 105 Ill. 205, is cited. That statement only contends that the instant petition does not present merely as strong a showing in support of the prayer as is disclosed in the *Illinois case*. This defendant's contention is not entirely correct. Hence, we think, under the ruling in the *Illinois case*, the trial court would have been justified had he permitted counsel for plaintiff to interrogate the jurors, in a circumstantial way, to ascertain if they had any financial interest in or had ever been employed by the London Guarantee & Insurance Co., Ltd. Defendant argues that the court in question is an English company and that it would be extremely unlikely that any juror had a financial interest in it, and that plaintiff's attorney did not, in the petition or in any oral statement to the trial court, make any claim that any of its stockholders resided in Cook County, Illinois; that the denial of the request in the petition for leave to interrogate the jurors as to whether they had ever been employed by the London Guarantee & Insurance Co., Ltd., was not prejudicial because plaintiff's attorney had the right to question each juror in reference to his present and past employment and in this way ascertain if he was employed or had been employed by the said company.

The defendant in *Illinois v. ...*, the court, after reviewing a number of cases in each of which the defendant contended that the trial court had erred in refusing to permit plaintiff's attorney to ask if any juror was interested in a certain insurance company - among the holdings

defending the suit - held that to require a reversal it must appear that the rights of the defendant were prejudiced by the examination, and the court further held (p. 598): "There can be no difference in a court of justice between the rights of litigants to a fair trial * * *." Even-handed justice requires that in a case like the instant one it must appear that plaintiff's rights were prejudiced by the action of the trial court in denying the prayer of the petition. Plaintiff makes no point that the verdict of the jury was against the manifest weight of the evidence, nor is the fairness of the jury's finding questioned in any way. Now, then, can it be reasonably argued that plaintiff's rights were prejudiced by the action of the trial court in denying the prayer of the petition? Upon the oral argument plaintiff's counsel took the position that the trial court in denying the prayer of the petition deprived plaintiff of "a fundamental right," and that this court must reverse the judgment, regardless of the merits of the case. We cannot agree with this contention. While, in our judgment, the action of the trial court constituted error, the judgment need not be reversed, because it appears that plaintiff was not prejudiced thereby. As we have heretofore stated, had the trial court refused to allow plaintiff to examine the jurors as to their qualifications, a different question would have been presented for our consideration.

The judgment of the Circuit court of Cook county is affirmed.

JUDGMENT AFFIRMED.

Sullivan, P. J., and Friend, J., concur.

...the suit - held that to require a reversal it must appear
that the rights of the defendant were prejudiced by the examination,
and the court further held (p. 398): "There can be no difference
in a court of justice between the rights of litigants to a fair trial
* * *". Even-handed justice requires that in a case like the instant
one it must appear that plaintiff's rights were prejudiced by the action
of the trial court in denying the prayer of the petition. Plaintiff
makes no point that the verdict of the jury was against the manifest
weight of the evidence, nor is the fairness of the jury's finding
questioned in any way. Now, then, can it be reasonably argued that
plaintiff's rights were prejudiced by the action of the trial court in
denying the prayer of the petition? Upon the oral argument plaintiff's
counsel took the position that the trial court in denying the prayer of
the petition deprived plaintiff of "a fundamental right," and that this
court must reverse the judgment, regardless of the merits of the case.
We cannot agree with this contention. While, in our judgment, the
action of the trial court constituted error, the judgment need not be
reversed, because it appears that plaintiff was not prejudiced thereby.
As we have heretofore stated, had the trial court refused to allow
plaintiff to examine the jurors as to their qualifications, a different
question would have been presented for our consideration.
The judgment of the Circuit court of Cook county is affirmed.

Sullivan, P. J., and Friend, J., concur.

40609

WILLIAM POLISCHUK,
(Plaintiff-Respondent)
Appellee,

v.

E. PERRY VAUGHAN and
CARL KUSTIN,
Defendants.

E. PERRY VAUGHAN,
(Defendant-Petitioner)
Appellant.

APPEAL FROM CIRCUIT
COURT OF COOK COUNTY.

302 I.A. 98

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

This case was tried before the court with a jury. The jury found defendant Carl Kustin guilty and assessed plaintiff's damages at the sum of \$1,000, and further found defendant E. Perry Vaughan not guilty. The trial court immediately entered judgment upon each verdict. Thereafter defendant Kustin filed a motion to vacate the judgment as to him and to grant him a new trial, and plaintiff filed a motion that the judgment be vacated as to defendant Vaughan and that plaintiff be granted a new trial as to said defendant. The trial court then heard arguments in support of the said motions and thereupon entered an order setting aside the judgment against defendant Kustin and granting him a new trial, and setting aside the judgment as to defendant Vaughan and granting plaintiff a new trial as to said defendant. Defendant Vaughan (hereinafter called defendant) filed a petition for leave to appeal from the order granting plaintiff a new trial as to him, and we granted leave to appeal.

The verified amended complaint alleges:

"William Polischuk complains of E. Perry Vaughan and Carl Kustin, defendants herein, and alleges as follows:

WILLIAM POLISCHUK,
(Plaintiff-Respondent)
Appellee,

v.

E. PERRY VAUGHAN and
CARL KUSTIN,
Defendants.

E. PERRY VAUGHAN,
(Defendant-Petitioner)
Appellant.

APPEAL FROM CIRCUIT

COURT OF APPEALS

302 I.A. 98

MR. JUSTICE ... DELIVERED THE OPINION OF THE COURT.

This case was tried before the court with a jury. The jury found defendant Carl Kustin guilty and assessed plaintiff's damages at the sum of \$1,000, and further found defendant E. Perry Vaughan not guilty. The trial court immediately entered judgment upon each verdict. Thereafter defendant Kustin filed a motion to vacate the judgment as to him and to grant him a new trial, and plaintiff filed a motion that the judgment be vacated as to defendant Vaughan and that plaintiff be granted a new trial as to said defendant. The trial court then heard arguments in support of the said motions and thereupon entered an order setting aside the judgment against defendant Kustin and granting him a new trial, and setting aside the judgment as to defendant Vaughan and granting plaintiff a new trial as to said defendant. Defendant Vaughan (hereinafter called defendant) filed a petition for leave to appeal from the order granting plaintiff a new trial as to him, and he granted leave to appeal.

The parties presented the following:

"William Polischuk complains of E. Perry Vaughan and Carl

Kustin, defendants herein, and alleges as follows:

"1. That he is a resident of the City of Chicago, County of Cook and State of Illinois, and has been a resident thereof for the past twenty-one years.

"2. That on, to-wit: the 2nd day of June, 1937, Carl Kustin, defendant herein, filed or caused to be filed a verified petition in the Clerk's Office of the County Court of Cook County, Case No. 139231, wherein he alleged among other things that he believes that this plaintiff is insane or suffering under mental derangement and unsafe to be at large, and that the welfare of the said Carl Kustin and others requires this plaintiff's restraint or commitment to some hospital or asylum for the insane, and that the facts in the [case] can be proven by E. Perry Vaughan, whom he alleged to be a regular practicing physician having personal knowledge of said case, and prayed that a warrant be issued for this plaintiff.

"3. That the said defendant, Carl Kustin, did on the 2nd day of June, 1937, file in the Clerk's Office of the County Court of Cook County in the entitled cause hereinabove set forth, a certificate dated June 1, 1937, which was attached to the petition mentioned in the preceding paragraph which stated among other things that Dr. E. Perry Vaughan, defendant herein, on said date examined this plaintiff and believes him to be mentally deranged or insane and in need of institutional care and treatment, and stated his diagnosis of this plaintiff as paranoid praecox.

"4. That the said petition, together with the said certificate of the Doctor was filed, as aforesaid, and are in the files of the Clerk of the County Court of Cook County, and will be produced at the hearing of this cause.

"5. Plaintiff alleges that the said defendant, Carl Kustin, filed the said petition, as aforesaid, well knowing that the allegations and statements made in said petition were utterly false, malicious and untrue; that the said defendant, Carl Kustin filed the certificate of the said E. Perry Vaughan, as aforesaid, together

"1. That he is a resident of the City of Chicago, Cook County of Cook and State of Illinois, and has been a resident thereof for the past twenty-one years.

"2. That on, to-wit: the 2nd day of June, 1937, Carl Kestlin, defendant herein, filed as caused to be filed a petition in the Clerk's Office of the County Court of Cook County, Case No. 193231, wherein he alleged among other things that he believes that this plaintiff is insane or suffering under mental derangement and unsafe to be at large, and that the welfare of the said Carl Kestlin and others requires this plaintiff's restraint or commitment to some hospital or asylum for the insane, and that the facts in the [case] can be proven by H. Perry Vaughan, whom he alleged to be a regular practicing physician having personal knowledge of said case, and prays that a warrant be issued for this plaintiff.

"3. That the said defendant, Carl Kestlin, did on the 2nd day of June, 1937, file in the Clerk's Office of the County Court of Cook County in the within case numbered as Case No. 193231 a certificate dated June 1, 1937, which was attached to the petition mentioned in the preceding paragraph which stated among other things that Dr. H. Perry Vaughan, defendant herein, on said date examined this plaintiff and believes him to be mentally deranged or insane and in need of institutional care and treatment, and stated his diagnosis of this plaintiff as paranoid psychosis.

"4. That the said petition, together with the said certificate of the doctor was filed, as aforesaid, and are in the files of the Clerk of the County Court of Cook County, and will be produced at the hearing of this cause.

"5. Plaintiff alleges that the said defendant, Carl Kestlin, filed the said petition, as aforesaid, well knowing that the allegations and statements made in said petition were utterly false, malicious and untrue; that the said defendant, Carl Kestlin filed the said petition of the said H. Perry Vaughan, as aforesaid, together

with the said petition, well knowing that the said E. Perry Vaughan did not examine this plaintiff as in the certificate alleged.

"6. That E. Perry Vaughan, defendant herein, executed a certificate that he examined this plaintiff on June 1, 1937, and believed him to be mentally deranged or insane, and in need of institutional care and treatment, that the said E. Perry Vaughan executed the said certificate well knowing that the allegations and statements made in said certificate were utterly false, malicious and untrue and well knowing that he did not examine this plaintiff.

"7. That the defendants, Carl Kustin and E. Perry Vaughan and each of them well knew that the said petition and certificate would be presented to the judge of the County Court of Cook County, that the judge of the County Court of Cook County would rely upon the truthfulness of the allegations in the said petition and certificate and that upon the basis of the said petition and certificate the judge of the County Court of Cook County would issue an order that a writ be issued and that this plaintiff would be arrested and confined and detained in the psychopathic ward of the Cook County Hospital and thereby deprived of his liberty and freedom.

"8. That by virtue of the false, untrue and malicious allegations and representations made in the said petition and certificate by the defendants, Carl Kustin and E. Perry Vaughan and each of them the judge of the County Court of Cook County did cause this plaintiff to be arrested and incarcerated in the psychopathic ward of the County hospital on the 3rd day of June, 1937, and that this plaintiff was detained in the ^{said} psychopathic ward against his will for a period of five days.

"9. That on June 10, 1937, a hearing was had on the insanity petition above mentioned in the County Hospital by a commission of physicians appointed by the County Court of Cook County, and that on said date the said commission appointed by the Court to determine the truth of the charges found that this plaintiff was not insane and discharged this plaintiff on said date.

with the said petition, well knowing that the said E. Perry Vaughan did not examine this plaintiff as in the certificate alleged.

"6. That E. Perry Vaughan, defendant herein, executed a certificate that he examined this plaintiff on June 1, 1937, and believed him to be mentally deranged or insane, and in need of institutional care and treatment, that the said E. Perry Vaughan executed the said certificate well knowing that the allegations and statements made in said certificate were utterly false, malicious and untrue and well knowing that he did not examine this plaintiff.

"7. That the defendants, Carl Kneiss and E. Perry Vaughan and each of them well knew that the said petition and certificate would be presented to the Judge of the County Court of Cook County, that the Judge of the County Court of Cook County would rely upon the truthfulness of the allegations in the said petition and certificate and that upon the basis of the said petition and certificate the Judge of the County Court of Cook County would issue an order that a writ be issued and that this plaintiff would be arrested and confined and detained in the psychopathic ward of the Cook County Hospital and thereby deprived of his liberty and freedom.

"8. That by virtue of the false, untrue and malicious allegations and representations made in the said petition and certificate by the defendants, Carl Kneiss and E. Perry Vaughan and each of them the Judge of the County Court of Cook County did cause this plaintiff to be arrested and incarcerated in the psychopathic ward of the County Hospital on the 2nd day of June, 1937, and that this plaintiff was detained in the ^{said} psychopathic ward against his will for a period of five days.

"9. That on June 10, 1937, a hearing was had on the sanity petition above mentioned in the County Hospital by a commission of physicians appointed by the County Court of Cook County, and that on said date the said commission appointed by the Court to determine the truth of the charges found that this plaintiff was not insane and discharged this plaintiff on said date.

"10. That the said Carl Kustin and E. Perry Vaughan filed or caused to be filed the said petition and certificate without cause and for the purpose of wilfully, maliciously and intentionally causing this plaintiff to be arrested, incarcerated and detained without any reasonable cause; that the act of the said Carl Kustin and E. Perry Vaughan, as aforesaid, was wilful, malicious and intentional and was done for the purpose of injuring the reputation of this plaintiff, and for the malicious and wilful purpose of causing this plaintiff to be incarcerated as hereinabove set forth.

"11. Plaintiff further alleges that by reason of the acts of the defendants Carl Kustin and E. Perry Vaughan, as charged in this complaint the said defendants did unlawfully and improperly conspire to commit this plaintiff to a hospital for the insane contrary to section 28 of chapter 85 of Illinois Revised Statutes which section is as follows:

"28. Conspiracy to commit person - Ill-treatment - Penalties. Any person who shall conspire to commit any person to any hospital or asylum for the insane unlawfully or improperly, or any person who shall receive or detain any insane person, contrary to the provisions of this act, or any person who shall maltreat any insane person, or any person who shall violate any provision contained in this act, shall be deemed guilty of misdemeanor, and, upon conviction thereof, shall be fined not exceeding one thousand dollars, or imprisoned not exceeding one year, or both, at the discretion of the court in which such conviction is had. (1893, June 21, Laws 1893, p. 140, Section 28.)

"12. Wherefore this plaintiff alleges that by reason of the wilful, malicious and wanton acts and the unlawful conspiracy of the said defendants, Carl Kustin and E. Perry Vaughan, as aforesaid, this plaintiff was deprived of his freedom and his reputation in the community was ruined, and he suffered great humiliation and was compelled to undergo various tests for insanity against his will and he lost a great deal of time and was unable to attend to his business.

"Wherefore this plaintiff claims damages against the said

"10. That the said Carl Kustlin and E. Perry Vaughan filed or caused to be filed the said petition and certificate without cause and for the purpose of willfully, maliciously and intentionally causing this plaintiff to be arrested, incarcerated and detained without any reasonable cause; that the act of the said Carl Kustlin and E. Perry Vaughan, as aforesaid, was willful, malicious and intentional and was done for the purpose of injuring the reputation of this plaintiff, and for the malicious and willful purpose of causing this plaintiff to be incarcerated as hereinabove set forth.

"11. Plaintiff further alleges that by reason of the acts of the defendants Carl Kustlin and E. Perry Vaughan, as charged in this complaint the said defendants did unlawfully and improperly conspire to commit this plaintiff to a hospital for the insane contrary to section 28 of chapter 87 of Illinois Revised Statutes which section is as follows:

"28. Conspiracy to commit person - Ill-treatment - Penalties. Any person who shall conspire to commit any person to any hospital or asylum for the insane unlawfully or improperly, or any person who shall receive or detain any insane person, contrary to the provisions of this act, or any person who shall maltreat any insane person, or any person who shall violate any provision contained in this act, shall be deemed guilty of misdemeanor, and, upon conviction thereof, shall be fined not exceeding one thousand dollars, or imprisoned not exceeding one year, or both, at the discretion of the court in which such conviction is had. (1893, June 21, Laws 1893, p. 140, Section 28.)

"12. Wherefore this plaintiff alleges that by reason of the willful, malicious and wanton acts and the unlawful conspiracy of the said defendants, Carl Kustlin and E. Perry Vaughan, as aforesaid, this plaintiff was deprived of his freedom and his reputation in the community was ruined, and he suffered great humiliation and was compelled to undergo various tests for insanity against his will and he lost a great deal of time and was unable to attend to his business. Therefore this plaintiff claims damages against the said

defendants, Carl Kustin and E. Perry Vaughan, and each of them in the sum of Fifty Thousand Dollars."

The following are the three contentions raised by defendant:

"I. The trial court allowed the motion of the plaintiff for a new trial as to the defendant, Dr. E. Perry Vaughan, after a verdict of the jury finding him not guilty, under a clear and manifest misapprehension of a supposed controlling rule of law. II. The trial court erred in a matter of law as to the gist of plaintiff's amended complaint. III. The verdict of the jury finding Dr. E. Perry Vaughan not guilty is in accord with the preponderance of the evidence."

"The law is thoroughly established that motions for new trials are addressed to the sound judgment of the trial judge and his action thereon will not be reversed except in case of a clear abuse of such discretion, which must be affirmatively shown; Berggren v. Travelers' Ins. Co., 231 Mass. 173, 120 N. E. 402; Graeger v. Hager, 275 Mich. 363, 266 N. W. 382; Rossman v. Newbon, 112 N. J. L. 261, 170 Atl. 230; Marks v. Brown, 138 Minn. 405, 165 N. W. 265; Wayne Sewer & Drain Co. v. Ward-Cowan Const. Co., 195 Ind. 75, 143 N. E. 290; Hastings v. Brooklyn Life Ins. Co., 138 N. Y. 473, 34 N. E. 289; Miller Brewing Co. v. City of Milwaukee, 155 Wis. 81, 143 N. W. 1066. It further appears to be the rule that reviewing courts are more reluctant to interfere with the grant of a new trial than with the refusal to set aside the verdict; Ten Cate v. Sharp, 8 Okla. 300, 57 Pac. 645; Cochran v. Cochran, 29 Ky. L. Rep. 332, 93 S. W. 18; Bloch Queensware Co. v. Smith (Mo.), 80 S. W. 592.

"The rule as stated 'is based upon the theory that the judge who tries the case, having the parties, their witnesses and counsel before him, with opportunity to observe their demeanor and conduct during the trial, and to note all incidents occurring during its progress likely to affect the result thereof, is better qualified to judge whether a fair trial has been held, and substantial justice done, than an appellate tribunal'; as held in Sharp v. Greene, 22 Wash. 677, 62 Pac. 147.

"Previous to the enactment of the Civil Practice Act and section 77 thereof, the award of a new trial was not a final order and hence not

defendants, Carl Kestlin and E. Perry Vaughan, and each of them in the

sum of fifty thousand dollars."

The following are the three contentions raised by defendant:

"I. The trial court allowed the motion of the plaintiff for a new trial as to the defendant, Dr. E. Perry Vaughan, after a verdict of the jury finding him not guilty, under a clear and manifest misapprehension of a supposed controlling rule of law. II. The trial court erred in a matter of law as to the gist of plaintiff's amended complaint. III. The verdict of the jury finding Dr. E. Perry Vaughan not guilty is in accord with the preponderance of the evidence."

"The law is thoroughly established that motions for new trials

are addressed to the sound judgment of the trial judge and his action

thereon will not be reversed except in case of a clear abuse of such

discretion, which must be affirmatively shown; Berkman v. Travelers', Ins.

Co., 211 Mass. 177, 125 N. E. 405; Brunner v. Brunner, 177 Mass. 367, 190

N. E. 507; Boston v. Boston, 125 N. E. 1, 190 N. E. 177; Smith v.

Brown, 138 Minn. 407, 167 N. W. 265; Wayne Sewer & Drain Co. v. Ward-Gowan

Company, 202 N. E. 198, 199 Ind. 72, 181 N. E. 370; Martin v. Providence, 192 N. E.

128 N. E. 477, 14 N. E. 207; Miller v. Miller, 192 N. E. 177, 193 N. E. 177

Wm. 51, 145 N. E. 104. It further appears in the rule that reversal

counts are more reluctant to interfere with the grant of a new trial than

with the refusal to set aside the verdict; Ten Cate v. Sharp, 8 Ohio, 300,

17 Cal. 647; Cochran v. Cochran, 29 Ky. L. Rep. 332, 92 N. E. 18; Bloch

Manufacture Co. v. Smith (No.), 80 S. W. 522.

"The rule as stated is based upon the theory that the judge

who tries the case, having the parties, their witnesses and counsel

before him, with opportunity to observe their demeanor and conduct during

the trial, and to note all incidents occurring during its progress likely

to affect the result thereof, is better qualified to judge whether a fair

trial has been held, and substantial justice done, than an appellate

tribunal; as held in Sharp v. Green, 22 Wash. 677, 68 Pac. 147.

"Previous to the enactment of the Civil Practice Act and section

77 thereof, the award of a new trial was not a final order and hence not

reviewable. By the act it was designated as one from which an appeal might be allowed by the reviewing court upon a proper showing. We find that such rulings as have been made by our courts upon the proposition since such act became operative, have been founded upon the general trend of current authority as evidenced by the foregoing quoted decisions, and as stated in Tone v. Halsey, Stuart & Co., Inc., 286 Ill. App. 169, wherein the court, in construing said section 77, said: 'many decisions of courts where similar statutes have been enacted are cited to the effect that only where the trial court has abused its discretion or proceeded upon some clear or manifest misapprehension of a supposed controlling rule of law, will an order for a new trial be reversed. Even in such cases, decisions indicate that courts are reluctant to reverse, and their power to do so is seldom exercised.' This case is quoted approvingly in Wagner v. Chicago Motor Coach Co., 288 Ill. App. 402.

"It being the law that the trial judge is allowed a broad judgment in the granting of new trials, and that his action in so doing will only be reversed where it affirmatively appears that he has clearly and palpably abused his discretion in that regard, and with the complexity of grave questions which arose upon the trial of this cause, all of which were known to the trial court, and their possible effect upon the jury understood by him, to an extent and in a way which we cannot gather from the written record, we are of opinion that he was placed in a better position to judge whether or not substantial justice had been done by the verdict than could a reviewing court, and we cannot say, therefore, that such discretion was transcended or abused." (Couch v. Southern Ry. Co., 294 Ill. App. 490, 492, 493. See, also, Callos v. Public Taxi Service, Inc., 292 Ill. App. 399, and cases cited therein; Wagner v. Chicago Motor Coach Co., 288 Ill. App. 402.)

Plaintiff, in his written motion for a new trial as to defendant, set up the following grounds (inter alia): "1. Error of the trial court in permitting counsel for defendant Vaughan to

...by the fact that it is not...
 might be allowed by the reviewing court upon a proper showing. It
 find that such rulings as have been made by our courts upon the
 proposition also such as the...
 the general trend of current authority as evidenced by the foregoing
 quoted decisions, and as stated in Tone v. Helsey, Stuart & Co., Inc.
206 Ill. App. 1st, 192, 193, in Helsey, Stuart & Co., Inc.
 said: "Many decisions of courts other than this court have been
 enacted are cited to the effect that only where the trial court has
 abused its discretion or proceeded upon some clear or manifest mis-
 apprehension of a supposed controlling rule of law, will an order
 for a new trial be reversed. Even in such cases, decisions indicate
 that courts are reluctant to reverse, and their power to do so is
 seldom exercised." This case is quoted approvingly in Wright v.
Chicago Motor Coach Co., 288 Ill. App. 402.

"It being the law that the trial judge is allowed a broad
 judgment in the granting of new trials, and that his action in so
 doing will only be reversed where it affirmatively appears that he
 has himself and palpably abused his discretion in so doing," and
 with the complexity of grave questions which arose upon the trial
 of this cause, all of which were given to the trial court, and which
 possible effect upon the jury rendered it not, to an extent not in
 a way which we cannot follow from the written record, we are of
 opinion that he was placed in a better position to judge whether or
 not substantial justice was done than by the reversal of such ruling.
 reviewing court, and we cannot say, therefore, that any error
 was committed or caused." (Wright v. Helsey, Stuart & Co., Inc.
206 Ill. App. 1st, 192, 193, and cases cited therein; Wright v. Helsey, Stuart & Co., Inc.
206 Ill. App. 1st, 192, 193).

...in the written motion for a new trial is to
 determine, not as the following precedents (Wright v. Helsey, Stuart & Co., Inc.
 of the trial court in granting a new trial for a new trial is to

cross examine parties to the suit called by plaintiff for cross examination under Section 60 of the Civil Practice Act. 2. Refusal of the court to admit testimony of a witness by the name of Barr. 3. The refusal of the court to give a specific instruction with reference to the proof required of a conspiracy. 4. The giving of instructions on behalf of the defendant Vaughan. 5. That the verdict in favor of defendant Vaughan was contrary to the greater weight of the evidence. 6. That the verdict of defendant Vaughan was contrary to law."

Defendant argues that the trial court granted the new trial as to him upon the sole ground that the trial court assumed that the complaint charged a conspiracy between the two defendants and that under the complaint it would be impossible for one defendant to be found guilty and the other one found not guilty, and that this was "a clear and manifest misapprehension of a supposed controlling rule of law." Counsel in support of his argument does not fully quote the court's opinion in passing upon the motions for a new trial. As we read the opinion the decision of the court was not based entirely upon the said ground. The court states in his opinion: "But, it is a combination of things in the trial of this case which I feel caused the jury to arrive at a peculiar verdict." In McMulty v. Hotel Sherman Co., 280 Ill. App. 325, 328, we said: "The Civil Practice Act being of recent enactment, the novel question presented is whether defendant's failure to prosecute a cross appeal precludes it from urging every ground and exception in the record entitling it to a new trial. The New York and New Jersey authorities cited by defendant hold, under similar circumstances, that on appeal the reviewing court is not confined to the ground upon which the decision below is based, but will consider every reason urged by the prevailing party which would entitle him to a new trial. (Waldrony. City of Utica, 238 N. Y. S. 401; Logan v. Guggenheim, 230 N. Y. 19; City of Buffalo v. DeBon, 249 N. Y. S. 586; Wolfert v. Edison, 169 N. Y. S. 484; Queen v. Jennings, 93 N. J. L. 353, 108 Atl. 379; Sussman v. Yellow Taxi Cab Co., 7 N. J. Misc. 325,

cross examine parties to the suit called by plaintiff for cross
 examination under Section 60 of the Civil Practice Act. S. Notarial
 of the court to admit testimony of a witness by the name of Bart.
 3. The refusal of the court to give a specific instruction with
 reference to the proof required of a conspiracy. 4. The giving of
 instructions on behalf of the defendant Vaughan. 5. That the verdict
 in favor of defendant Vaughan was contrary to the greater weight of
 the evidence. 6. That the verdict of defendant Vaughan was contrary
 to law."

Defendant argues that the trial court erred in the way in which
 as to him upon the sole ground that the trial court assumed that the
 complaint charged a conspiracy between the two defendants and that
 under the complaint it would be impossible for one defendant to be
 found guilty and the other one found not guilty, and that this was
 "a clear and manifest misapprehension of a supposed controlling rule
 of law." Counsel in support of his argument does not fully quote the
 court's opinion in passing upon the motion for a new trial. As we
 read the opinion the decision of the court was not based entirely
 upon the said ground. The court states in his opinion: "But, it is
 a combination of things in the trial of this case which I feel caused
 the jury to arrive at a peculiar verdict." In McIntyre v. Hotel Sherman
Co., 280 Ill. App. 325, 326, we said: "The Civil Practice Act being
 of recent enactment, the novel question presented is whether defendant's
 failure to prosecute a cross appeal precludes it from urging every
 ground and exception in the record entitling it to a new trial. The
 New York and New Jersey authorities cited by defendant hold, under
 similar circumstances, that on appeal the reviewing court is not com-
 lined to the ground upon which the decision below is based, but will
 consider every reason urged by the prevailing party which would entitle
 him to a new trial. (Citation of cases.) 280 N. Y. 2d 401, 402
V. O'Connell, 230 N. Y. 19; City of Buffalo v. Deboy, 249 N. Y. 21
280; Wolff v. Wilson, 195 N. Y. 2d 424; Green v. Janney, 95 N. Y. 21
1. 375, 108 App. 371; Graham v. Folio, 100 App. 20; N. Y. Misc. 325

145 Atl. 470.)" We further said (p. 331): "When an appeal from such an order is allowed it will be considered the same as any other appeal under the provisions of the Civil Practice Act. The reason stated in the order for granting a new trial is not controlling, and when the whole record is brought up on appeal defendant should be allowed to urge any ground upon which it relied in the lower court to sustain the order or judgment. Accordingly, we hold that defendant herein may urge every ground and exception preserved in the record entitling it to a new trial." Any other rule would work a grave injustice to the party that obtained the new trial. In our view of this appeal we do not deem it necessary to pass upon the instant contention that the court misapprehended the law.

Counsel for defendant argues that there is nothing in the evidence "that tends in the slightest to show that Dr. Vaughan was guilty of a conspiracy." We cannot agree with this contention. As this case will very likely be tried again we think it advisable to refrain from citing and commenting upon the evidence that bears upon the alleged conspiracy. We will refer, however, to certain general principles that govern cases where conspiracy is charged: "The law is settled that it is not necessary to prove that alleged conspirators came together and actually agreed, in terms, upon a common design and to pursue it by common means. It is sufficient if it be proved by facts and circumstances that they pursued, by their acts, the same object, one performing one part, another performing another part of the same, so as to complete it with a view to the attainment of that same object, for under such a state of facts the conclusion would be justified that they were engaged in a conspiracy to effect that object." (People ex rel. Rusch v. Rivlin, 277 Ill. App. 183, 196.) It is a settled rule of law that when the fact of conspiracy is once established, any act of one of the conspirators in the prosecution of the enterprise is considered the act of all; and it is also settled law that actual proof of a conspiracy cannot, in the nature of things, usually be made, and that often it must be inferred from proof of the acts of the

147 Atl. 470.)" We further said (p. 331): "When an appeal from such an order is allowed it will be considered the same as any other appeal under the provisions of the Civil Practice Act. The reason stated in the order for granting a new trial is not controlling, and when the whole record is brought up on appeal defendant should be allowed to urge any ground upon which it relied in the lower court to sustain its order or judgment. Accordingly, we hold that defendant herein may urge any ground not previously urged in the record and submit it to a new trial." Any other rule would work a grave injustice to the party that obtained the new trial. In our view of this appeal we do not deem it necessary to pass upon the instant contention that the court misapprehended the law.

Counsel for defendant argues that there is nothing in the evidence "that tends in the slightest to show that Dr. Vaughan was guilty of a conspiracy." We cannot agree with this contention. As this case will very likely be tried again we think it advisable to refrain from stating and commenting upon the evidence that bears upon the alleged conspiracy. We will refer, however, to certain general principles that govern cases where conspiracy is charged: "The law is settled that it is not necessary to prove that alleged conspirators came together and actually agreed, in terms, upon a common design and to pursue it by common means. It is sufficient if it be proved by facts and circumstances that they pursued, by their acts, the same object, one part forming one part, another performing another part of the same, so as to complete it with a view to the attainment of that same object, for under such a state of facts the conclusion would be justified that they were engaged in a conspiracy to effect that object." (People v. ..., 171 Ill. 471, 1904.) It is a settled rule of law that when the fact of conspiracy is once established, any act of one of the conspirators in the prosecution of the enterprise is considered the act of all; and it is also settled law that actual proof of a conspiracy cannot, in the nature of things, usually be made, and that often it must be inferred from proof of the acts of the

-9-

parties and circumstances in connection therewith. The statute provides (Ill. Rev. Stat. 1937, chap. 85, sec. 28): "Any person who shall conspire to commit any person to any hospital or asylum for the insane unlawfully or improperly * * * shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be fined not exceeding one thousand dollars, or imprisoned not exceeding one year, or both, at the discretion of the court in which such conviction is had." Defendant argues that the evidence shows that "there is absolutely nothing in the record tending to show that his [defendant's] conduct was not absolutely honest and bona fide." If our conclusion as to the last contention of defendant is justified by the evidence, it would follow that the instant argument is without merit.

Defendant contends that the verdict of the jury as to defendant Vaughan was supported by the preponderance of the evidence. We believe that under all the facts and circumstances in evidence we would not be justified in holding that the trial court would have clearly and palpably abused his discretion had he held to the contrary. One of the grounds assigned by plaintiff in support of his motion for a new trial was "that the verdict in favor of defendant Vaughan was contrary to the greater weight of the evidence." While, as we have heretofore stated, we do not deem it advisable to cite and comment upon the evidence, we feel justified in stating that there are certain mountain peaks in the evidence that support plaintiff's charge against the defendants and that cannot easily be disregarded.

After a careful consideration of defendant's petition we have reached the conclusion that the trial court was justified in concluding that justice would be best served by a retrial of the instant cause, and the order of the Circuit court of Cook county granting plaintiff a new trial as to defendant Vaughan is affirmed.

ORDER GRANTING PLAINTIFF A NEW TRIAL AS
TO DEFENDANT VAUGHAN AFFIRMED.

Sullivan, P. J., and Friend, J., concur.

and circumstances in connection therewith. The statute provides (Ill. Rev. Stat. 1937, chap. 88, sec. 28): "Any person who shall con-

spire to commit any person to any hospital or asylum for the insane unlawfully or improperly * * * shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be fined not exceeding one thousand

dollars, or imprisoned not exceeding one year, or both, at the discretion of the court in which such conviction is had." Defendant argues that the evidence shows that "there is absolutely nothing in the record going to show that his [defendant's] conduct was not absolutely honest and bona fide." If our conclusion as to the last contention of defendant is justified by the evidence, it would follow that the defendant's

argument is without merit.

Defendant contends that the verdict of the jury as to defendant Vaughan was supported by the preponderance of the evidence. We believe that under all the facts and circumstances in evidence we would not be justified in holding that the trial court would have clearly and palpably abused his discretion had he held to the contrary. One of the grounds assigned by plaintiff in support of his motion for a new trial was "that the verdict in favor of defendant Vaughan was contrary to the greater weight of the evidence." While, as we have heretofore stated, we do not deem it advisable to cite and comment upon the evidence, we feel justified in stating that there are certain mountain peaks in the evidence that support plaintiff's charge against the defendant and that cannot easily be disregarded.

After a careful consideration of defendant's petition we have reached the conclusion that the trial court was justified in concluding that justice would be best served by a retrial of the instant case, and the order of the Circuit court of Cook county granting plaintiff a new trial as to defendant Vaughan is affirmed.

ORDER GRANTING PLAINTIFF'S A NEW TRIAL AS
TO DEFENDANT VAUGHAN AFFIRMED.

WILLIAM F. J. and ELLIOTT, J., concur.

40614

SADIE CIANCY,
(Plaintiff) Appellee,

v.

GUY A. RICHARDSON and WALTER
J. CUMMINGS, as Receivers,
etc., et al., doing business
as CHICAGO SURFACE LINES;
GLOBE CARTAGE COMPANY, INC.,
a corporation; CLARENCE CLARK
and CHARLES SENG,
Defendants.

APPEAL FROM SUPERIOR
COURT OF COOK COUNTY.

302 I.A. 99

GUY A. RICHARDSON and WALTER
J. CUMMINGS, as Receivers,
etc., et al., doing business
as CHICAGO SURFACE LINES,
(Defendants) Appellants.

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

A jury returned a verdict in favor of plaintiff and assessed her damages at \$3,500. The receivers of the Chicago Surface Lines, defendants (hereinafter called appellants), appeal from a judgment entered upon the verdict. At the conclusion of plaintiff's evidence the latter voluntarily dismissed the case as to all of the defendants save appellants.

On April 30, 1935, plaintiff was a passenger on a west bound 79th street car of the Surface Lines. She was seated in the third seat from the rear, on the right hand side of the car. The accident in question occurred about 7 or 7:30 p.m., when it was still daylight. The streets were dry. There are two street railway tracks on 79th street, one for west bound and the other for east bound traffic. There are also two street railway tracks on Ashland avenue, one for south bound and the other for north bound traffic. From curb to curb Ashland avenue is approximately 70 feet wide, and from building line to building line it is

1. THEORY (100 marks)

THE UNIVERSITY OF CHICAGO
 DIVISION OF THE PHYSICAL SCIENCES
 DEPARTMENT OF CHEMISTRY
 5712 S. UNIVERSITY AVE.
 CHICAGO, ILL. 60637
 TEL. 773-707-3500
 FAX 773-707-3500

THESE TWO VOLUMES, BY
THE SAME AUTHOR, ARE
AVAILABLE IN A SINGLE
VOLUME, PRICE \$1.50
PER COPY. (SEE PAGE 10)

Una Tiziana lo aveva in tasca e lo aveva comprato a 100 lire.

not damaged at \$3,300. The receiver of the Illinois

(The following text is mirrored from the previous page)

From a judgment entered upon the verdict. At the conclusion of

Plaintiff's evidence the latter voluntarily dismissed the case

... challenges were attributed only to lack of an

On April 30, 1935, Plaintiff was a passenger on a boat

bound 79th street out of the surface lines. She was seated in

the third seat from the rear, on the right hand side of the car.

ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED EXCEPT WHERE SHOWN OTHERWISE

still daylight, the streets were dry. There are two streets

railway tracks on 75th street, one for west bound and the other

There are also two street railway crossings.

...for South Island and the other for North

— The following is a list of the names of the persons who have been appointed to the various positions in the various departments of the Government of the State of New York, for the year 1900.

At the same time, the Commission is aware of the need to ensure that the information provided is accurate and reliable. It is therefore necessary to establish a system of checks and balances to ensure that the information is accurate and reliable.

approximately 101 feet wide. When the west bound 79th street car arrived at Ashland avenue it stopped at the usual stopping place, with the front end of the car about even with the east building line of that street. About the same time a south bound street car on Ashland avenue came up to the intersection and stopped with its front end about even with the north building line of 79th street. After the west bound 79th street car had discharged and taken on passengers it proceeded across the intersection, and when the front end of the car had reached a point on a line with the building line on the west side of Ashland avenue or beyond it, a south bound motor truck ran into the extreme rear end of the street car - "the rear end of the rear platform" - with such force that it "ripped the rear end of the street car off." The force of the impact caused plaintiff to be "thrown forward and backward and then out on the aisle," and she sustained the injuries for which she sued. The truck was made up of two units: one consisting of the cab and motor; the other, the trailer. The trailer was about eighteen feet long, six and one-half feet wide, and about ten feet high. The first unit weighed a ton and a half, and the trailer three and one-half tons. Four and one-half tons of merchandise was carried in the trailer. The complaint charged that the motor vehicle or truck at the time in question was in the possession and control of defendants Globe Cartage Company, Inc., a corporation; Clarence Clark and Charles Seng. Defendant Clark, who was called by plaintiff as a witness under section 60 of the new Practice act (Ill. Rev. Stat. 1937, chap. 110, par. 134), testified that at the time of the accident he was driving the motor truck and that defendant Seng was operating the truck.

Plaintiff's case against appellants was based upon the theory of fact that the west bound 79th street car entered the intersection while the traffic light for west bound traffic was amber or red. Appellants' theory of fact was that the street car entered the inter-

approximately 101 feet wide. When the west bound 79th street car arrived at Ashland avenue it stopped at the usual stopping place, with the front end of the car about even with the east building line of that street. About the same time a north bound street car on Ashland avenue came up to the intersection and stopped with its front end about even with the north building line of 79th street. After the west bound 79th street car had discharged and taken on passengers it proceeded across the intersection, and when the front end of the car had reached a point on a line with the building line on the west side of Ashland avenue or beyond it, a south bound motor truck ran into the extreme rear end of the street car - "the rear end of the rear platform" - with such force that it "tipped the rear end of the street car off." The force of the impact caused plaintiff to be "thrown forward and backward and then out on the aisle," and she sustained the injuries for which she sues. The truck was made up of two units: one consisting of the cab and motor; the other, the trailer. The trailer was about eighteen feet long, six and one-half feet wide, and about ten feet high. The first unit weighed a ton and a half, and the trailer three and one-half tons. Four and one-half tons of merchandise was carried in the trailer. The complaint charged that the motor vehicle or truck at the time in question was in the possession and control of defendant Globe Garage Company, Inc., a corporation organized under the laws of the State of New York, and was called by plaintiff as a witness under section 80 of the new Evidence Law (Laws of 1937, Chap. 110, Sec. 104), testified that at the time of the accident he was driving the motor truck and that defendant company was operating the truck.

Plaintiff's case against defendant was based upon the theory of fact that the west bound 79th street car entered the intersection while the south bound motor truck was under way.

Plaintiff's theory of fact was that the street car entered the inter-

section when the traffic light showed green for west bound traffic and that it had proceeded a considerable distance over the intersection before the light changed.

The jury, therefore, had but one material question of fact to determine, viz: Did the west bound street car start to cross the intersection while the traffic light was amber or red for west bound traffic? Appellants strenuously contend that the jury's finding upon this question is against the clear and manifest weight of the evidence. Counsel for both sides have made able and exhaustive arguments as to the credibility of the witnesses whose testimony bears upon the instant question and the weight that should be given their testimony. Disinclined as we are to reverse a jury upon its finding upon any controverted question of fact, we feel, after a very careful examination of all the evidence bearing upon the ultimate question of fact, that it is our duty to sustain the instant contention. We find that the testimony of four witnesses tends to support plaintiff's theory of fact. One of the witnesses was defendant Clark, who was called by plaintiff under section 60 of the new Practice act. We further find that the testimony of ten witnesses supports appellants' theory of fact. In reaching our conclusion we have given due consideration to plaintiff's argument that some of the witnesses testifying for appellants were employees of the Surface Lines. We find force in the argument of appellants that they were prejudiced by the action of plaintiff in voluntarily dismissing the case as to defendants Globe Cartage Company, Inc., Clarence Clark and Charles Seng. Plaintiff voluntarily dismissed the cause as to the said defendants at the conclusion of plaintiff's evidence, when no motions had been made by any defendants. Plaintiff had made out a prima facie case of gross negligence against the driver of the motor truck, and while she had a right to dismiss her cause as to any of the defendants, we are forced to the conclusion that her action in that regard

section when the traffic light showed green for west bound traffic
and that it had proceeded a considerable distance over the inter-
section before the light changed.
The jury, therefore, had not one material question of fact
to determine, viz: Did the west bound street car stand to cross
the intersection while the traffic light was amber or red for west
bound traffic? Appellate court--It seems that the jury's finding
upon this question is against the clear and manifest weight of the
evidence. Counsel for both sides have made able and exhaustive
arguments as to the credibility of the witnesses whose testimony
bears upon the instant question and the weight that should be given
their testimony. Disinclined as we are to reverse a jury upon its
finding upon any controverted question of fact, we feel, after a
very careful examination of all the evidence bearing upon the ultimate
question of fact, that it is our duty to sustain the instant conviction.
We find that the testimony of ten witnesses tends to support plain-
tiff's theory of fact. One of the witnesses was defendant Clark,
who was called by plaintiff under section 60 of the new Practice act.
We further find that the testimony of ten witnesses supports ap-
pealant's theory of fact. In reaching our conclusion we have given the
consideration to plaintiff's argument that some of the witnesses
testifying for appellant were employees of the Surface Lines. No
real force in the argument of appellant that they were prejudiced
by the action of plaintiff in voluntarily dismissing the case as to
defendant John Davis Company, Inc., appears from our review
of the record. Plaintiff voluntarily dismissed the cause as to the said
defendant at the conclusion of plaintiff's evidence, when no witness
had been made by any defendant. Plaintiff had made out a prima facie
case of gross negligence against the driver of the motor truck, and
while she had a right to dismiss her cause as to any of the defend-
ants, we are forced to the conclusion that her action in that regard

unduly influenced the jury in determining the material question of fact in the case. It is conceded, of course, that plaintiff was not guilty of any negligence; and that she was at least entitled to a verdict against the Surface Lines or the defendants who owned or controlled the motor truck is beyond dispute. When three of the defendants were dismissed from the cause, if the jury found the Surface Lines not guilty plaintiff, with a clear right of action against one or more of the original defendants, would have lost her suit as to all defendants. With such a situation confronting them the jury would be prone to consider the evidence in a light favorable to plaintiff. As this case will very likely be tried again we refrain from commenting upon the evidence bearing upon the ultimate question of fact.

Several times, in her brief, plaintiff seems to argue that even if the street car entered the intersection when the light was green for west bound traffic, nevertheless, the jury would have been justified in finding that the motorman, in the exercise of proper care, had an opportunity to see the on-coming motor truck in time to avoid the collision and that he was negligent in that regard, and plaintiff, by reason of such negligence, was entitled to recover. It is a sufficient answer to this argument to say that if we are correct in our conclusion that appellants' theory of fact, that the street car entered the intersection when the traffic light showed green for west bound traffic and that it had proceeded a considerable distance over the intersection before the light changed, was sustained by the clear and manifest weight of the evidence, there can be no reasonable basis for plaintiff's argument. Even witnesses for plaintiff testified that the front end of the west bound car was past the building line on the west side of Ashland avenue at the time the motor truck struck the rear end of the street car, and that the motor truck was a little to the west of the south bound tracks on Ashland avenue at

unduly influenced the jury in determining the material question of fact in the case. It is conceded, of course, that plaintiff was not guilty of any negligence; and that she was at least entitled to a verdict against the Surace lines or the defendants who owned or controlled the motor truck in beyond dispute. When three of the defendants were dismissed from the cause, if the jury found the Surace lines not guilty plaintiff, with a clear right of action against one or more of the original defendants, would have lost her suit as to all defendants. With such a situation confronting them the jury would be prone to consider the evidence in a light favorable to plaintiff. As this case will very likely be tried again we refrain from commenting upon the evidence bearing upon the ultimate question

Several times, in her brief, plaintiff seems to argue that even if the street car entered the intersection when the light was green for west bound traffic, nevertheless, the jury would have been justified in finding that the motorman, in the exercise of proper care, had an opportunity to see the on-coming motor truck in time to avoid the collision and that he was negligent in that regard, and plaintiff, by reason of such negligence, was entitled to recover. It is a sufficient answer to this argument to say that if we are correct in our conclusion that appellant's theory of fact, that the street car

entered the intersection when the traffic light showed green for west bound traffic and that it had proceeded a considerable distance over the intersection before the light changed, was sustained by the clear and manifest weight of the evidence, there can be no reasonable

basis for appellant's argument. Even assuming the plaintiff testified that the front end of the west bound car was past the building line on the east side of Island Avenue at the time the motor truck struck the rear end of the street car, and that the motor truck was a little to the west of the south bound tracks on Island Avenue at

the time that it struck the street car. As one of the witnesses for plaintiff testified, "Had the car gotten by another foot, there wouldn't be an accident." There was a safety island to the west of the south bound track on Ashland avenue, and defendant testified Clark that at the time of the impact the rear end of the street car was west of the safety island, "just two or three feet." When Clark was first called as a witness he testified that at the time of the impact "the truck was going around 18" miles an hour. When he was later called as a court's witness he testified that when he was within one or two feet of the street car he "was traveling at 5 or 6 miles an hour."

Appellants argue that "the alleged negligence relied upon, even if proved, was not the proximate cause of the accident," and that we should reverse, without remanding, the cause. In support of this contention appellants argue that "the act complained of, if proved, did nothing more than furnish a condition by which the injury was made possible by the subsequent independent act of a third person which in no manner flowed from the act complained of but which was given an opportunity to operate through the occasion furnished by the act complained of. In such case the act which merely created the condition was not the proximate cause." We find no merit in this contention. The principle of law invoked does not apply to the facts of the instant case. While the alleged negligent act of the defendant must be the cause which produces the injury it need not be the sole cause, or the last or nearest cause. It is sufficient if it concurs with some other cause acting at the same time, which, in combination with it, causes the injury. Plaintiff produced evidence tending to prove that the Surface Lines and also the parties who owned or controlled the motor truck were guilty of negligence, and under her theory of fact the negligence of each of the parties combined to cause the injuries. See Mahan v. Richardson, 284 Ill. App. 493, 498, 499, 500, where the same contention raised

the time that it struck the vessel, as one of the witnesses

testified that there was a safety island to the

west of the main house street in the town, and that

at that time of the impact the rear end of the vessel

was west of the safety island, "just two or three feet,"

that was first called as a witness he testified that at the time

of the impact "the truck was going around 125 miles an hour,"

that he was later called as a court's witness he testified that when he

was within one or two feet of the wheel say he "was traveling at

2 or 3 miles an hour."

Appellants argue that "the alleged negligence relied upon,

even if proved, was not the proximate cause of the accident," and

that we should reverse, without remanding, the cause. In support

of this contention appellants argue that "the act complained of,

if proved, did nothing more than furnish a condition by which the

injury was made possible by the subsequent independent act of a

third person which in no manner flowed from the act complained of

but which was a distinct and independent cause, the act which

furnished by the act complained of. In such case the act which

merely created the condition was not the proximate cause," we find

no merit in this contention. The principle of law involved does not

apply to the facts of the instant case. While the alleged negligent

act of the defendant must be the cause which produces the injury it

need not be the sole cause, or the last or nearest cause. It is

sufficient if it concurs with some other cause acting at the same

time, and, in combination with it, causes the injury. Liability

produced evidence tending to prove that the surface lines and also

the parties who owned or controlled the same were guilty of

negligence, and would not deny to the defendant at any of

-6-

by the instant appellants is discussed and determined.

We find no substantial merit in the further contention of appellants that "there was error in the giving, refusal, and modification of instructions."

The judgment of the Superior court of Cook county is reversed and the cause is remanded for a new trial.

JUDGMENT REVERSED AND CAUSE
REMANDED FOR NEW TRIAL.

Sullivan, P. J., and Friend, J., concur.

of the latest specimens of the fossil was determined.
We find no substantial merit in the further contention of
opponents that "there was error in the giving, taking, and
modification of specimens."
The judgment of the Superior Court of Cook County is
reversed and the cause is remanded for a new trial.

REVEREND JUSTICE OF THE PEACE
JAMES M. KELLY.

GILLIAM, P. J., and WILSON, J., concur.

40655

MARTHA EHRENWERTH, Executrix,
etc.,

Appellee,

v.

CARRIE MOOG,

Appellant.

APPEAL FROM CIRCUIT COURT,
COOK COUNTY.

302 I.A. 114

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Appeal by Carrie Moog, petitioner (hereinafter called appellant), from a final order denying her "motion and petition and amendment to the petition" to quash the capias ad satisfaciendum issued in a suit entitled Martha Ehrenwerth, Executrix, etc. v. Carrie Moog, wherein a judgment for \$1,738.17 was entered against appellant. She did not appeal from the judgment, and after a capias ad satisfaciendum had been issued paid on account of the judgment the sum of \$1,020.

Appellant bases the instant appeal upon the following grounds:

"(a) The finding and order are void for the reason that the decree and judgment run in favor of Martha Ehrenwerth, Executrix of the last Will and Testament of William Rohlf, deceased, whereas no summons or service of the same was ever issued or served in the name of Martha Ehrenwerth, Executrix of the last Will and Testament of William Rohlf, deceased, against Carrie Moog, the defendant.

"(b) That the finding and order are void for the reason that the original summons was issued in the name of William Rohlf as plaintiff, and was not served upon the defendant, Carrie Moog, until after the death of the said William Rohlf and without the substitution of any party plaintiff in the place and stead of William Rohlf, plaintiff and without the issuance of a summons in the name of such substituted party plaintiff.

"(c) The finding and order are void for the further

"(a) The finding and order are void for the reason that the name of each substituted party is identical."

William Kohl, Plaintiff and against the Defendant of a summons in substitution of Mrs. George H. Kohl in the same and filed of

until after the death of the said William Kohl and without the as Plaintiff, and was not served upon the Defendant, Carrie Wood, that the original summons was issued in the name of William Kohl

"(b) That the finding and order are void for the reason of William Kohl, deceased, against Carrie Wood, the defendant, name of Martha H. Kohl, deceased, of the last Will and Testament no summons or service of the same was ever issued or served in the

of the last Will and Testament of William Kohl, deceased, whereas the decree and judgment was in favor of Martha H. Kohl, deceased, (a) The finding and order are void for the reason that

Appellant hence the instant appeal upon the following judgment the sum of \$1,020.

Appellant. She did not appeal from the judgment, and after a judgment, wherein a judgment for \$1,738.14 was entered against

issued in a suit entitled Martha H. Kohl, deceased, et al. v. Carrie Wood, wherein a judgment for \$1,738.14 was entered against

and amendment to the petition" to quash the same as set forth in the petition, from a final order denying her motion and petition

Appeal of Carrie Wood, Plaintiff and Defendant against the Defendant, William Kohl, deceased, and against the Defendant, Carrie Wood, Plaintiff.

reason that the finding of malice in favor of the plaintiff, Martha Ehrenwerth, Executrix of the last Will and Testament of William Rohlf, deceased, and against the defendant, Carrie Moog, was erroneous in that the charge of fraud, deceit and malice, charged by the said William Rohlf, was personal to the said William Rohlf, and did not transfer, inure or survive to the benefit of the said substituted party plaintiff.

"(d) That there are no allegations of fact sufficient to show that the substituted plaintiff, Martha Ehrenwerth, Executrix of the last Will and Testament of William Rohlf, deceased, was injured by the fraud and deceit of this defendant as alleged in the complaint.

"(e) The law requires before any writ for imprisonment shall issue that a demand shall be made upon the defendant for payment of the judgment in question and in addition thereto an affidavit must be filed showing that the defendant has property and money sufficient to satisfy said judgment and refuses to deliver the same to the judgment creditor, none of which requirements have been complied with in this cause. Therefore, no writ of capias ad satisfaciendum should have been issued herein.

"(f) That the court erred in not entering a finding in this cause upon an accounting as prayed in the complaint filed herein.

"(g) That the decree entered herein does not find that malice is the gist of this action as required by the statutes of this State, there being no special finding of the court to that effect."

Points (a) and (b) may be considered together. There is no merit in either contention. William Rohlf was the original plaintiff, and the summons was issued in his name and was served upon appellant after the death of Rohlf and before the substitution of Martha Ehrenwerth, executrix of his estate, as plaintiff. The

reason that the finding of malice in favor of the plaintiff, Martin
Whitworth, executor of the last will and testament of William
Kohl, deceased, and against the defendant, Garrie Wood, was
erroneous in that the charge of fraud, deceit and malice, charged
by the said William Kohl, was personal to the said William Kohl,
and did not transfer, inure or survive to the benefit of the said
substituted party plaintiff.

"(6) That there are no allegations of fact sufficient to
show that the substituted plaintiff, Martin Whitworth, executor
of the last will and testament of William Kohl, deceased, was
injured by the fraud and deceit of this defendant as alleged in the
complaint.

"(7) The law requires before any writ for imprisonment shall
issue that a demand shall be made upon the defendant for payment of
the judgment in question and in addition thereto an affidavit must
be filed showing that the defendant has property and money sufficient
to satisfy said judgment and refuse to deliver the same to the
judgment creditor, none of which requirements have been complied
with in this case. Therefore, no writ of habeas corpus shall issue
therein.

"(8) That the court erred in not entering a finding in this
case upon an accounting as prayed in the complaint filed herein.

"(9) That the court erred in not entering a finding in this
case that the plaintiff is entitled to the benefit of the estate of
this State, there being no special finding of the court to that
effect."

Points (a) and (b) may be considered together. There is
no writ in this case. William Kohl was the plaintiff
plaintiff, and the summons was issued in his name and was served
upon appellant after the death of Kohl and before the substitution
of Martin Whitworth, executor of his estate, as plaintiff. The

-3-

court had jurisdiction of the subject matter of the complaint and obtained jurisdiction of the person of appellant by her voluntary appearance to the merits after the substitution of the executrix as party plaintiff. Appellant made no objection to the summons and filed an answer to the complaint. The cause was referred to Master in Chancery Eley, and appellant and her witnesses appeared before the master and gave testimony bearing on the merits of the cause. She filed written objections to the master's report. Upon her motion an order was entered by the court allowing her objections to stand as exceptions to the master's report. Her counsel argued the exceptions before the court. She and her counsel were present in court at the time of the entry of the decree. In view of these facts it is idle to argue that appellant did not submit her person to the jurisdiction of the court. "While a defendant may stand on all his legal rights and require all the forms of law to be pursued before he can be required to answer, in a case of which the court has general jurisdiction he may dispense with the process altogether, waive irregular process and appear in the case. (Mitchell v. Jacobs, 17 Ill. 235; Coleen v. Figgins, Breese, 19.) Where a defendant is in court and attempts to make a defense which can only be sustained by an exercise of jurisdiction the appearance is general, whether it is in terms limited to a special purpose or not. (People v. Southern Gem Co., 332 Ill. 370; City of Rock Island v. Chippianneck Cemetery Ass'n, 328 id. 236.) Appellant's conduct, as above stated, constituted a general appearance on his part, and he cannot now be heard to claim that the court did not have jurisdiction of his person. Price v. Pittsburgh, Ft. Wayne and Chicago Railroad Co., 40 Ill. 44." (Brown v. VanKeuren, 340 Ill. 118, 122.) The decision in Mitchell v. King, 187 Ill. 452, cited by appellant, is based upon facts entirely different from the facts found in the instant case.

As to point (c), appellant contends that the right of action was entirely personal to the original plaintiff and that upon Rohlf's

... court has jurisdiction of the subject-matter of the complaint and
obtained jurisdiction of the person of appellant by her voluntary
appearance to the master after the substitution of the executor as
party plaintiff. Appellant made no objection to the summons and
filed an answer to the complaint. The cause was referred to Master
in Chancery Wiley, and appellant and her witnesses appeared before
the master and gave testimony bearing on the merits of the cause.
The filed written objections to the master's report. Upon her
motion an order was entered by the court allowing her objections to
stand as exceptions to the master's report. Her counsel argued the
exceptions before the court. She and her counsel were present in
court at the time of the entry of the decree. In view of these facts
it is able to argue that appellant did not submit her person to the
jurisdiction of the court. "While a defendant may stand on all his
legal rights and reserve all the forms of law to be pursued before
he can be required to answer, in a case of which the court has
general jurisdiction he may dispense with the forms of law."
welve irregular process and appear in the case. (Witchell v. Jacobs,
IV Ill. 232; Goleen v. Watkins, Press, 19.) Where a defendant is
in court and attempts to make a defense which can only be sustained
by an exercise of jurisdiction the appearance is general, whether
it is in terms limited to a special purpose or not. (People v.
Southern Iron Co., 222 Ill. 271; City of Cook v. Cook Island v. Cook,
Demarest v. Demarest, 222 Ill. 286.) Appellant's conduct, as above stated,
constituted a general appearance on his part, and he cannot now be
heard to claim that the court did not have jurisdiction of him.
People v. People, 222 Ill. 271; City of Cook v. Cook Island v. Cook,
222 Ill. 286. (People v. People, 222 Ill. 271; City of Cook v. Cook Island v. Cook,
222 Ill. 286.) Appellant, 187 Ill. 482, cited by appellant, is based upon
facts entirely different from the facts found in the instant case.
As to point (c), appellant contends that the right of action
was exclusively personal to the original plaintiff and that upon Kohn's

death the suit abated. There is no merit in this contention. The suit was for the fraudulent and malicious conversion of personal property, and survived both by statute and by operation of law. The death of Rohlf was duly suggested and the executrix was substituted as party plaintiff. In Geiger v. Merle, 360 Ill. 497, the suit was in equity to set aside a deed alleged to have been procured by fraud. The original plaintiff died after suit was brought and it was contended that the suit wholly abated. In holding adversely to this contention the Supreme court said (pp. 509-510): "The action was within the general jurisdiction of equity because of the charge of fraud. It was not a special statutory proceeding, though it asserted statutory rights.

"An abatement, in the sense of the common law, is an entire overthrow or destruction of the suit, but in equity an abatement signifies only a present suspension of all proceedings in the event of the death of one of the parties. (Story's Eq. Pl. (10th ed.) sec. 354; 1 R. C. L. p. 20.) Section 10 of the act on abatement provides that if there is but one plaintiff, petitioner or complainant in an action, proceeding or complaint, in law or equity, and he shall die before final judgment or decree, such action, proceeding or complaint shall not on that account abate if the cause of action survive to the heir, devisee, executor or administrator of such decedent, but any of such to whom the cause of action shall survive may, by suggesting such death upon the record, be substituted as plaintiff, petitioner or complainant and prosecute the same as in other cases. (Cahill's Stat. 1933, p. 41; Smith's Stat. 1933, p. 74.) 'If the cause of action survive to the heir, devisee, executor or administrator of such decedent' this action is included within the foregoing section.

"It is contended by counsel for appellants that the action is so entirely personal that it could not be transferred to the personal representative of the deceased party in interest, and that such is one of the tests of whether an action survives. Section

...the estate of the deceased. The court held that the estate of the deceased was not a party plaintiff. In Walker v. Morris, 300 Ill. 487, the court was in equity to set aside a deed alleged to have been procured by fraud. The original plaintiff died after suit was brought and it was contended that the suit wholly abated. In holding adversely to this contention the Supreme Court said (pp. 502-510): "The action was within the general jurisdiction of equity because of the charge of fraud. It was not a special statutory proceeding, though it asserted statutory rights. An abatement, in the sense of the common law, is an entire overthrow or destruction of the suit, but in equity an abatement signifies only a present suspension of all proceedings in the event of the death of one of the parties. (Story's Eq. Pl. (10th ed.) sec. 354; 1 R. C. L. p. 30.) Section 10 of the act on abatement provides that if there is but one plaintiff, petitioner or complainant in an action, proceeding or complaint, in law or equity, and he shall die before final judgment or decree, such action, proceeding or complaint shall not on that account abate if the cause of action survive to the heir, devisee, executor or administrator of such decedent, but any of such to whom the cause of action shall survive may, by suggesting such death upon the record, be substituted as plaintiff, petitioner or complainant and prosecute the same as in other cases. (Smith's Stat. 1933, p. 41; Smith's Stat. 1935, p. 44.) If the cause of action survive to the heir, devisee, executor or administrator of such decedent, this action is included within the foregoing section. It is contended by counsel for appellants that the action is an entirely personal one and that it could not be transferred to the personal representative of the deceased party in interest, and that such is one of the tests of whether an action survives. Section

123 of the act on administration of estates provides that in addition to the actions which survive by the common law the following shall also survive: Actions of replevin, actions to recover damages for an injury to the person, (except slander and libel,) actions to recover damages for an injury to real or personal property, actions against officers for misfeasance, malfeasance or non-feasance of themselves or their deputies, and all actions for fraud or deceit. (Cahill's Stat. 1933, p. 65; Smith's Stat. 1933, pp. 100, 101.)

Counsel for appellee contend that the action here is included within the words 'all actions for fraud or deceit.' Counsel for appellants contend that these words refer only to the common law action, and, even admitting that fraud is the gist of the action, the suit is not an action for fraud. The word 'all' is comprehensive and might indicate the legislative purpose not to confine the right of survival to one kind of action under the common law founded on tort and seeking damages but to embrace all actions under those subjects. It is, however, unnecessary to decide whether the action properly comes within that statute, for, being an action within the general jurisdiction of equity, and fraud being the gist of the action, it does not die with the person. (Warner v. Flack, 278 Ill. 303.) The bill of revivor was unnecessary under the statute. The death of the party was sufficiently suggested of record, and the action did not abate and was properly continued by the administratrix of the estate of the original complainant." The Geiger case was decided in 1935. Paragraph 125 of the Administration act (Ill. Rev. Stat. 1937, chap. 3), which pertains to "Actions Which Survive," contains the following words (sec. 123), "or for the detention or conversion of personal property."

As to point (d), appellant argues that "the representations in the case under discussion were not made to Martha Shrenwerth, either personally or as Executrix of the Last Will and Testament of William Rohlf, deceased, if such representations were ever made,

128 of the act on administration of estates provides that in addition to the actions which survive by the common law the following shall also survive: actions of trespass, actions to recover damages for an injury to the person, (except slander and libel,) actions to recover damages for an injury to real or personal property, actions against officers for misfeasance, malfeasance or non-feasance of themselves or their deputies, and all actions for fraud or deceit. [Cecil's case, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000]

they were made to Rohlf, they were personal as to him and the representations did not survive to anyone after his death. Surely even if Shrenwerth did, as she was required to do, after the suggestion of death, file an amended complaint, she could not allege fraud and deceit, for she was not the injured party." This seems to be an argument in support of point (c). The original complaint charged that appellant procured from William Rohlf the sum of \$1,612.53, by the exercise of fraud and undue influence and in violation of the fiduciary relation which she occupied toward him. It further charged that the false representations were made to Rohlf, and the master, in the trial court, found "that on June 1st, 1936, the defendant procured from William Rohlf the sum of Two Hundred Ninety and 13/100 Dollars and on June 23rd, 1936, the sum of One Thousand Three Hundred Twenty-two and 40/100 Dollars, both by the exercise of fraud and undue influence and in violation of the fiduciary relation which she occupied towards him; that she wrongfully, fraudulently and maliciously converted said sums amounting to One Thousand Six Hundred Twelve and 53/100 Dollars to her own use and is wrongfully, fraudulently and maliciously withholding the same from the plaintiff, executrix." As the present action survived to the executrix she stood in the shoes of Rohlf. There is no merit in the instant point.

As to point (e), appellant contends that before the capias can properly issue, demand must be made upon the defendant for payment of the judgment and the application for the writ must be supported by an affidavit. There is no merit in this contention. The decree in the instant case sounded in tort, and malicious fraud was the gist of the action. Neither demand nor application for the writ supported by an affidavit was a prerequisite to the issuance of the writ. In all actions where malicious fraud is the gist of the action a writ issues as a matter of course. (See Field & Co. v. Freed, 269 Ill. 558; People v. Walker, 286 Ill. 541; In re Pet'n of Blackledge, 359 Ill. 482, 486; Lipman v. Goebel, 357 Ill. 315.) The fact that

they were made to Kohn, they were personal as to him and the
representations did not survive to anyone after his death. Surely
even if Thurner did, as she was required to do, after the
suggestion of death, file an amended complaint, she could not allege
fraud and deceit, for she was not the injured party. This seems to
be an argument in support of point (c). The original complaint
charged that appellant procured from William Kohn the sum of
\$1,000.00, by the exercise of fraud and undue influence and in vio-
lation of the fiduciary relation which she occupied toward him.
It further charged that the false representations were made to Kohn,
and the master, in the trial court, found "that on June 1st, 1934,
the defendant procured from William Kohn the sum of Two Hundred Ninety
and 15/100 Dollars and on June 2nd, 1934, the sum of One Thousand
Three Hundred Twenty-two and 40/100 Dollars, both by the exercise of
fraud and undue influence and in violation of the fiduciary relation
which she occupied toward him; that she wrongfully, fraudulently and
unlawfully converted said sums amounting to one thousand and ninety
and 15/100 Dollars to her own use and is wrongfully, fraudulently
and unlawfully withholding the same from the plaintiff, respondent."
In the present action survived to the executor the right in the
shares of Kohn. There is no merit in the instant point.
As to point (d), appellant contends that certain of the
sum properly issue, demand must be made upon the defendant for payment
of the judgment and the application for the writ must be supported
by an affidavit. There is no merit in this contention. The decree
in the instant case rendered in 1934, and which was found and the first
of the action, without awarding any satisfaction for the writ suggested
by an affidavit was a proceeding to the recovery of the writ. In
all actions where satisfaction is made by the writ, the writ is
issued as a matter of course. (See Writs & Remedies, 2nd Ed.
1934, Writs & Remedies, 2nd Ed., 1934, Writs & Remedies, 2nd Ed.,
1934, Writs & Remedies, 2nd Ed., 1934, Writs & Remedies, 2nd Ed., 1934)
The writ, then, being issued, the writ is issued. The writ being

a decree does not expressly provide for the issuance of a writ of capias ad satisfaciendum does not preclude the issuance of the writ where the gist of the action is the perpetration of a malicious fraud although the action is in form one for equitable relief.

(Corwin v. Tillman, 255 Ill. App. 230. Certiorari denied by the Supreme court, 256 Ill. App. xxxvii.)

There is no merit in point (f), wherein appellant contends "that the court erred in not entering a finding in this cause upon an accounting as prayed in the complaint filed herein." It is sufficient to say that this is not an appeal from the decree in the original cause.

We find no merit in point (g), wherein appellant contends that the decree entered in the original cause "does not find that malice is the gist of this action as required by the statutes of this State, there being no special finding of the court to that effect." As to the contention that the master made no special finding that malice was the gist of the action, we note that appellant has seen fit to omit from the record the master's report, although we find in the record her objections to the report. In her fourth objection she complains that the master erred in finding "that the defendant procured from William Rohlf the sum of \$1612.53 both by exercise of fraud and undue influence and in violation of the fiduciary relation which she occupied toward him and that she wrongfully, fraudulently and maliciously converted said sum to her own use, and so withholding the same from the plaintiff, executrix." The decree follows, apparently, the master's report, and finds, inter alia:

"17. That on June 1st, 1936, the defendant procured from William Rohlf the sum of Two Hundred Ninety and 13/100 Dollars and on June 23rd, 1936, the sum of One Thousand Three Hundred Twenty-Two and 40/100 Dollars, both by the exercise of fraud and undue influence and in violation of the fiduciary relation which she occupied towards him; that she wrongfully, fraudulently and maliciously converted said

It is not necessary to prove that the defendant was not guilty of the crime charged in the indictment. It is sufficient to prove that the defendant was guilty of the crime charged in the indictment.

People v. Williams, 208 Ill. App. 300, 301. The defendant was found guilty of the crime charged in the indictment.

There is no merit in point (2). Wherein appellant contends that the court erred in not granting a finding in this case upon the facts as presented in the complaint filed herein. It is the duty of the court to find the facts as presented in the complaint.

There is no merit in point (3). Wherein appellant contends that the court erred in the original error "upon the facts as presented in the complaint filed herein". It is the duty of the court to find the facts as presented in the complaint.

The court, in its opinion, found that the defendant was guilty of the crime charged in the indictment. The court's finding is based upon the facts as presented in the complaint.

It is not necessary to prove that the defendant was not guilty of the crime charged in the indictment. It is sufficient to prove that the defendant was guilty of the crime charged in the indictment.

The court, in its opinion, found that the defendant was guilty of the crime charged in the indictment. The court's finding is based upon the facts as presented in the complaint.

It is not necessary to prove that the defendant was not guilty of the crime charged in the indictment. It is sufficient to prove that the defendant was guilty of the crime charged in the indictment.

The court, in its opinion, found that the defendant was guilty of the crime charged in the indictment. The court's finding is based upon the facts as presented in the complaint.

It is not necessary to prove that the defendant was not guilty of the crime charged in the indictment. It is sufficient to prove that the defendant was guilty of the crime charged in the indictment.

sums amounting to One Thousand Six Hundred Twelve and 53/100 Dollars to her own use and is wrongfully, fraudulently and maliciously withholding the same from the plaintiff, executrix.

"18. That William Rohlf never made a gift of any of his stock or money to the defendant.

"19. That in respect of the money claimed by the defendant to have been retained by her father out of the proceeds of the second sale of stock, and also of the money alleged to have been returned to him from time to time in small sums, the defendant should not be given any credit. She made no such claims in her verified answer. The repeated averments in her answer that she never received or retained any money from her father, are knowingly false and fraudulent in respect of material matters in issue. Her testimony relative to the money she claims was retained or returned to her father and as to what he did with it, does not bear the ear-marks of truth. She is neither corroborated in respect of it by any witness nor by any fact or circumstance in evidence.

"20. That the defendant's testimony as to this money is unworthy of belief and that it should be disregarded, and that she is chargeable with the entire amount of the proceeds of the sale of the stock, and is not entitled to credit for amounts which she can neither specify nor prove."

The decree further finds that Rohlf, at the time of the transactions with appellant, "was feeble and impaired both in mind and body due to his age and was senile, weak, forgetful and childish," and there is sufficient in the record to show that appellant took advantage of the condition of her father to defraud him of moneys belonging to him.

All of the points made upon the present appeal are of a technical nature.

The judgment of the Circuit court of Cook county is a just one and it should be and it is affirmed.

JUDGMENT AFFIRMED.

Sullivan, P. J., and Friend, J., concur.

...and ...

...to her own use and is ...

...witnessing the same from the plaintiff, ...

"18. That ... never made a gift of any of his ...

...of money to the defendant.

"19. That in respect of the money claimed by the defendant ...

...to have been retained by her father out of the proceeds of the second ...

...of stock, and also of the money alleged to have been retained to ...

...him from time to time in small sums; the defendant should not be ...

...given any credit. She made no such claim in her verified answer.

The repeated averments in her answer that she never received or re- ...

...tained any money from her father, are knowingly false and fraudulent ...

in respect of material matters in issue. Her testimony relative to ...

the money she claims was retained or returned to her father and as ...

to what he did with it, does not bear the same marks of truth. She ...

is neither corroborated in respect of it by any witness nor by any ...

fact or circumstance in evidence.

"20. That the defendant's testimony as to this money is ...

unworthy of belief and that it should be disregarded, and that she ...

is chargeable with the entire amount of the proceeds of the sale of ...

the stock, and is not entitled to credit for the amount which she ...

neither specially nor prove."

The decree further finds that ... at the time of the ...

transactions with appellant, "was feeble and impaired both in mind ...

and body due to his age and was feeble, weak, forgetful and childish."

40655

MARTHA EHRENWERTH, Executrix,
etc.,
Appellee,
v.
CARRIE MOOG,
Appellant.

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

302 I.A. 114^{1A}

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

ADDITIONAL OPINION UPON PETITION FOR REHEARING.

In a petition for rehearing filed by appellant, her counsel argue that Mitchell v. King, 187 Ill. 452, is directly in point and sustains appellant's contention that the finding and judgment order in the original case are void, and we are asked by counsel to reconsider that case. The writer of this opinion was one of the attorneys for the appellee in that case and is familiar with the facts contained therein and the opinion of the Supreme court. There four summonses were issued, none of which was served. Plaintiff, John Mitchell, died on February 19, 1898, two years after the issuance of the fourth summons. The suit was in assumpsit and survived to the plaintiff in error as executrix, but the death of John Mitchell was not suggested nor the executrix substituted as plaintiff. On August 5, 1898, a fifth summons was taken out in the name of the deceased plaintiff, returnable at the September term, 1898, and this summons was served on the defendant on August 18, 1898. Nothing was done at the September term, but at the October term Bridget Mitchell, executrix of the deceased plaintiff, appeared and suggested his death upon the record, and it was ordered that the cause proceed in her name. Then the defendant, who had not appeared, was defaulted, the plaintiff's damages were assessed at \$8,000, and

judgment was entered for that amount and costs. On November 21, 1898, "the defendant entered his appearance for the purpose of a motion to vacate the judgment, and moved the court to vacate and set aside the same." This motion was in the nature of a writ of error coram nobis. On the hearing of the motion it was shown that John Mitchell had been dead for some time when the summons of August 5, 1898, was sued out and served upon the defendant. The Supreme court held that under the statute the suit was not destroyed by the death of Mitchell and the executrix had the privilege of suggesting his death and being substituted as plaintiff so as to continue the suit; but the court further held that the statute did not authorize the court to proceed without a plaintiff and did not authorize any action to be taken until the death was suggested and the legal representative substituted; that "in every suit there must always be a plaintiff, a defendant and a court," and the judgment of the Appellate court reversing the judgment against the defendant, King, was affirmed. In the instant case, as appears from our opinion, the appellant, after the substitution of the executrix as party plaintiff, voluntarily appeared, in person and by counsel, and defended the suit. We repeat what we said in our opinion, that the ruling in Mitchell v. King is based upon facts entirely different from the facts in the instant case and does not support appellant's position.

The petition for rehearing is denied.

REHEARING DENIED.

Sullivan, P. J., and Friend, J., concur.

judgment was entered for that amount and costs. On November 21, 1898, "the defendant entered his appearance for the purpose of a motion to vacate the judgment, and moved the court to vacate and set aside the same." This motion was in the nature of a writ of error coram nobis. On the hearing of the motion it was shown that

John Mitchell had been dead for some time when the summons of August 7, 1898, was sued out and served upon the defendant. The Supreme court held that under the statute the writ was not destroyed

by the death of Mitchell and the executor had the privilege of suggesting his death and being substituted as plaintiff so as to maintain the suit; but the court further held that the statute did not authorize the court to proceed without a plaintiff and did not authorize any action to be taken until the death was suggested and

the legal representative substituted; that "in every suit there must always be a plaintiff, a defendant and a court," and the judg-

ment of the appellate court reversing the judgment against the defendant, King, was affirmed. In the instant case, as appears from our opinion, the appellant, after the substitution of the executor as party plaintiff, voluntarily appeared, in person and by counsel, and defended the suit. We repeat what we said in our opinion, that the ruling in Mitchell v. King is based upon facts entirely different from the facts in the instant case and does not support appellant's

position.

The petition for rehearing is denied.

REHEARING DENIED.

WILLIAM F. J. and FRIEND, J., concur.

40708

JOHN WIELGOSIAK and
LOTTIE WIELGOSIAK, his wife,
Appellees,

v.

BEST BUILT COMPANY,
a corporation,
Appellant.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

302 I.A. 114²

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

This action was tried by the court without a jury, there was a finding for plaintiffs in the sum of \$225, and defendant appeals from a judgment entered upon the finding.

Plaintiffs' statement of claim alleges:

"1. Plaintiffs allege that between the date of September 12, 1936, and September 30, 1936, the plaintiffs paid to the defendant, by and through the duly authorized agent and servant in that behalf, the sum of Six Hundred (\$600.00) Dollars, said payments being as follows: September 12, 1936, the sum of \$300.00; on September 29, 1936, the sum of \$200.00; and on September 30, 1936, the sum of \$100.00; \$300.00 of said sum of \$600.00 was to be held by the defendant and to be used in the following manner: \$150.00 to be paid to one, F. Wendt, in full payment of his bill for services rendered in connection with the property at 3339 S. Mosspratt Street, and the balance of \$150.00 to be paid to one, Frank Krolik, in payment of his bill for services rendered in connection with the property located at 3339 S. Mosspratt Street; all of which is set forth in a receipt executed by the defendant, which receipt is in words and figures as follows:

"September 30, 1936

"Received of John Wielgosiak
One Hundred and no/100 - - - - Dollars
To be applied on account of Wendt -
Raising bill.

2004

JOHN EDWARD WINE
LOUISIANA, his wife
J. EDWARD

MANICOTTUM NO. 11 11-11-11
NO. 11 11-11-11

...the ...
...the ...
...the ...

ATLANTIS

THE JUSTICE DEPARTMENT DELIVERED ITS OPINION ON THE CASE.

This section was ruled by the court without a jury, there

and a finding for plaintiffs in the sum of \$225, and defendant

appeals from a judgment entered upon the finding.

1. The following is a list of the names of the persons who have been identified as having been in contact with the subject of this investigation:

1. Plaintiff alleges that between the date of September

12, 1936, and September 30, 1936, the amounts paid to the

...and, by the way, the only thing that I have seen...

is that belief; the son of the Hundred (1000.00) Dollars, said

payments being as follows: September 12, 1932, the sum of \$200.00;

On September 22, 1966, the sum of \$200.00; and on September 24, 1966,

The sum of \$100.00; \$200.00 of said sum of \$300.00 was to be held by

The following items are to be used in the following manner:

aid to me, I thought, in fully payment of his bill for services.

in connection with the property of 3000 E. Broadway, New York, N. Y.

and the influence of various conditions, it is not possible to

ALL RIGHTS RESERVED BY THE UNITED STATES GOVERNMENT

10.40 February 2000, 17:00-18:00, 18:00-19:00, 19:00-20:00, 20:00-21:00, 21:00-22:00, 22:00-23:00, 23:00-24:00, 24:00-25:00, 25:00-26:00, 26:00-27:00, 27:00-28:00, 28:00-29:00, 29:00-30:00, 30:00-31:00, 31:00-32:00, 32:00-33:00, 33:00-34:00, 34:00-35:00, 35:00-36:00, 36:00-37:00, 37:00-38:00, 38:00-39:00, 39:00-40:00, 40:00-41:00, 41:00-42:00, 42:00-43:00, 43:00-44:00, 44:00-45:00, 45:00-46:00, 46:00-47:00, 47:00-48:00, 48:00-49:00, 49:00-50:00, 50:00-51:00, 51:00-52:00, 52:00-53:00, 53:00-54:00, 54:00-55:00, 55:00-56:00, 56:00-57:00, 57:00-58:00, 58:00-59:00, 59:00-60:00, 60:00-61:00, 61:00-62:00, 62:00-63:00, 63:00-64:00, 64:00-65:00, 65:00-66:00, 66:00-67:00, 67:00-68:00, 68:00-69:00, 69:00-70:00, 70:00-71:00, 71:00-72:00, 72:00-73:00, 73:00-74:00, 74:00-75:00, 75:00-76:00, 76:00-77:00, 77:00-78:00, 78:00-79:00, 79:00-80:00, 80:00-81:00, 81:00-82:00, 82:00-83:00, 83:00-84:00, 84:00-85:00, 85:00-86:00, 86:00-87:00, 87:00-88:00, 88:00-89:00, 89:00-90:00, 90:00-91:00, 91:00-92:00, 92:00-93:00, 93:00-94:00, 94:00-95:00, 95:00-96:00, 96:00-97:00, 97:00-98:00, 98:00-99:00, 99:00-100:00, 100:00-101:00, 101:00-102:00, 102:00-103:00, 103:00-104:00, 104:00-105:00, 105:00-106:00, 106:00-107:00, 107:00-108:00, 108:00-109:00, 109:00-110:00, 110:00-111:00, 111:00-112:00, 112:00-113:00, 113:00-114:00, 114:00-115:00, 115:00-116:00, 116:00-117:00, 117:00-118:00, 118:00-119:00, 119:00-120:00, 120:00-121:00, 121:00-122:00, 122:00-123:00, 123:00-124:00, 124:00-125:00, 125:00-126:00, 126:00-127:00, 127:00-128:00, 128:00-129:00, 129:00-130:00, 130:00-131:00, 131:00-132:00, 132:00-133:00, 133:00-134:00, 134:00-135:00, 135:00-136:00, 136:00-137:00, 137:00-138:00, 138:00-139:00, 139:00-140:00, 140:00-141:00, 141:00-142:00, 142:00-143:00, 143:00-144:00, 144:00-145:00, 145:00-146:00, 146:00-147:00, 147:00-148:00, 148:00-149:00, 149:00-150:00, 150:00-151:00, 151:00-152:00, 152:00-153:00, 153:00-154:00, 154:00-155:00, 155:00-156:00, 156:00-157:00, 157:00-158:00, 158:00-159:00, 159:00-160:00, 160:00-161:00, 161:00-162:00, 162:00-163:00, 163:00-164:00, 164:00-165:00, 165:00-166:00, 166:00-167:00, 167:00-168:00, 168:00-169:00, 169:00-170:00, 170:00-171:00, 171:00-172:00, 172:00-173:00, 173:00-174:00, 174:00-175:00, 175:00-176:00, 176:00-177:00, 177:00-178:00, 178:00-179:00, 179:00-180:00, 180:00-181:00, 181:00-182:00, 182:00-183:00, 183:00-184:00, 184:00-185:00, 185:00-186:00, 186:00-187:00, 187:00-188:00, 188:00-189:00, 189:00-190:00, 190:00-191:00, 191:00-192:00, 192:00-193:00, 193:00-194:00, 194:00-195:00, 195:00-196:00, 196:00-197:00, 197:00-198:00, 198:00-199:00, 199:00-200:00, 200:00-201:00, 201:00-202:00, 202:00-203:00, 203:00-204:00, 204:00-205:00, 205:00-206:00, 206:00-207:00, 207:00-208:00, 208:00-209:00, 209:00-210:00, 210:00-211:00, 211:00-212:00, 212:00-213:00, 213:00-214:00, 214:00-215:00, 215:00-216:00, 216:00-217:00, 217:00-218:00, 218:00-219:00, 219:00-220:00, 220:00-221:00, 221:00-222:00, 222:00-223:00, 223:00-224:00, 224:00-225:00, 225:00-226:00, 226:00-227:00, 227:00-228:00, 228:00-229:00, 229:00-230:00, 230:00-231:00, 231:00-232:00, 232:00-233:00, 233:00-234:00, 234:00-235:00, 235:00-236:00, 236:00-237:00, 237:00-238:00, 238:00-239:00, 239:00-240:00, 240:00-241:00, 241:00-242:00, 242:00-243:00, 243:00-244:00, 244:00-245:00, 245:00-246:00, 246:00-247:00, 247:00-248:00, 248:00-249:00, 249:00-250:00, 250:00-251:00, 251:00-252:00, 252:00-253:00, 253:00-254:00, 254:00-255:00, 255:00-256:00, 256:00-257:00, 257:00-258:00, 258:00-259:00, 259:00-260:00, 260:00-261:00, 261:00-262:00, 262:00-263:00, 263:00-264:00, 264:00-265:00, 265:00-266:00, 266:00-267:00, 267:00-268:00, 268:00-269:00, 269:00-270:00, 270:00-271:00, 271:00-272:00, 272:00-273:00, 273:00-274:00, 274:00-275:00, 275:00-276:00, 276:00-277:00, 277:00-278:00, 278:00-279:00, 279:00-280:00, 280:00-281:00, 281:00-282:00, 282:00-283:00, 283:00-284:00, 284:00-285:00, 285:00-286:00, 286:00-287:00, 287:00-288:00, 288:00-289:00, 289:00-290:00, 290:00-291:00, 291:00-292:00, 292:00-293:00, 293:00-294:00, 294:00-295:00, 295:00-296:00, 296:00-297:00, 297:00-298:00, 298:00-299:00, 299:00-300:00, 3

© 1999 Blackwell Science Ltd, *Journal of Internal Medicine* 245: 399–407

1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097, 2098, 2099, 2100, 2101, 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2118, 2119, 2120, 2121, 2122, 2123, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138, 2139, 2140, 2141, 2142, 2143, 2144, 2145, 2146, 2147, 2148, 2149, 2150, 2151, 2152, 2153, 2154, 2155, 2156, 2157, 2158, 2159, 2160, 2161, 2162, 2163, 2164, 2165, 2166, 2167, 2168, 2169, 2170, 2171, 2172, 2173, 2174, 2175, 2176, 2177, 2178, 2179, 2180, 2181, 2182, 2183, 2184, 2185, 2186, 2187, 2188, 2189, 2190, 2191, 2192, 2193, 2194, 2195, 2196, 2197, 2198, 2199, 2200, 2201, 2202, 2203, 2204, 2205, 2206, 2207, 2208, 2209, 2210, 2211, 2212, 2213, 2214, 2215, 2216, 2217, 2218, 2219, 2220, 2221, 2222, 2223, 2224, 2225, 2226, 2227, 2228, 2229, 2230, 2231, 2232, 2233, 2234, 2235, 2236, 2237, 2238, 2239, 2240, 2241, 2242, 2243, 2244, 2245, 2246, 2247, 2248, 2249, 2250, 2251, 2252, 2253, 2254, 2255, 2256, 2257, 2258, 2259, 2260, 2261, 2262, 2263, 2264, 2265, 2266, 2267, 2268, 2269, 2270, 2271, 2272, 2273, 2274, 2275, 2276, 2277, 2278, 2279, 2280, 2281, 2282, 2283, 2284, 2285, 2286, 2287, 2288, 2289, 2290, 2291, 2292, 2293, 2294, 2295, 2296, 2297, 2298, 2299, 2300, 2301, 2302, 2303, 2304, 2305, 2306, 2307, 2308, 2309, 2310, 2311, 2312, 2313, 2314, 2315, 2316, 2317, 2318, 2319, 2320, 2321, 2322, 2323, 2324, 2325, 2326, 2327, 2328, 2329, 2330, 2331, 2332, 2333, 2334, 2335, 2336, 2337, 2338, 2339, 2340, 2341, 2342, 2343, 2344, 2345, 2346, 2347, 2348, 2349, 2350, 2351, 2352, 2353, 2354, 2355, 2356, 2357, 2358, 2359, 2360, 2361, 2362, 2363, 2364, 2365, 2366, 2367, 2368, 2369, 2370, 2371, 2372, 2373, 2374, 2375, 2376, 2377, 2378, 2379, 2380, 2381, 2382, 2383, 2384, 2385, 2386, 2387, 2388, 2389, 2390, 2391, 2392, 2393, 2394, 2395, 2396, 2397, 2398, 2399, 2400, 2401, 2402, 2403, 2404, 2405, 2406, 2407, 2408, 2409, 2410, 2411, 2412, 2413, 2414, 2415, 2416, 2417, 2418, 2419, 2420, 2421, 2422, 2423, 2424, 2425, 2426, 2427, 2428, 2429, 2430, 2431, 2432, 2433, 2434, 2435, 2436, 2437, 2438, 2439, 2440, 2441, 2442, 2443, 2444, 2445, 2446, 2447, 2448, 2449, 2450, 2451, 2452, 2453, 2454, 2455, 2456, 2457, 2458, 2459, 2460, 2461, 2462, 2463, 2464, 2465, 2466, 2467, 2468, 2469, 2470, 2471, 2472, 2473, 2474, 2475, 2476, 2477, 2478, 2479, 2480, 2481, 2482, 2483, 2484, 2485, 2486, 2487, 2488, 2489, 2490, 2491, 2492, 2493, 2494, 2495, 2496, 2497, 2498, 2499, 2500, 2501, 2502, 2503, 2504, 2505, 2506, 2507, 2508, 2509, 2510, 2511, 2512, 2513, 2514, 2515, 2516, 2517, 2518, 2519, 2520, 2521, 2522, 2523, 2524, 2525, 2526, 2527, 2528, 2529, 2530, 2531, 2532, 2533, 2534, 2535, 2536, 2537, 2538, 2539, 2540, 2541, 2542, 2543, 2544, 2545, 2546, 2547, 2548, 2549, 2550, 2551, 2552, 2553, 2554, 2555, 2556, 2557, 2558, 2559, 2560, 2561, 2562, 2563, 2564, 2565, 2566, 2567, 2568, 2569, 2570, 2571, 2572, 2573, 2574, 2575, 2576, 2577, 2578, 2579, 2580, 2581, 2582, 2583, 2584, 2585, 2586, 2587, 2588, 2589, 2590, 2591, 2592, 2593, 2594, 2595, 2596, 2597, 2598, 2599, 2600, 2601, 2602, 2603, 2604, 2605, 2606, 2607, 2608, 2609, 2610, 2611, 2612, 2613, 2614, 2615, 2616, 2617, 2618, 2619, 2620, 2621, 2622, 2623, 2624, 2625, 2626, 2627, 2628, 2629, 2630, 2631, 2632, 2633, 2634, 2635, 2636, 2637, 2638, 2639, 2640, 2641, 2642, 2643, 2644, 2645, 2646, 2647, 2648, 2649, 2650, 2651, 2652, 2653, 2654, 2655, 2656, 2657, 2658, 2659, 2660, 2661, 2662, 2663, 2664, 2665, 2666, 2667, 2668, 2669, 2670, 2671, 2672, 2673, 2674, 2675, 2676, 2677, 2678, 2679, 26

© 1997 Blackwell Science Ltd *Journal of Internal Medicine* 241: 395–402

*Inventory of James Earl Ray
was conducted May 29/70 - by William
- James Earl Ray - at Dallas.
Dallas Police.

"\$100.00

"BEST BUILT CO.
B. BROTMAN"

on the reverse side the following:

"1 Previous Paid - \$200.00 for cement man
and House Raizer.

All Total - \$300.00"

"2. Plaintiffs further allege that there has been returned to the plaintiffs from one, B. Brotman, who, on the dates aforesaid was an agent of the defendant, the sum of \$75.00 out of said \$300.00, to be held in escrow as aforesaid, leaving the sum of \$225.00 in the hands of the defendant to be applied by the defendant in the manner hereinbefore set forth, as was agreed.

"3. Plaintiffs further allege that defendant has failed and refused to apply said moneys in accordance with the agreement, and that on the contrary, the said defendant has maliciously, wilfully and unlawfully converted said moneys to its own use.

"4. Plaintiffs further allege that they have made numerous attempts upon the defendant to either pay said money, in accordance with the agreement hereinbefore set forth, or to return said moneys to the plaintiffs, but that the said defendant has refused and failed so to do, and still persists in said refusal.

"Wherefore, plaintiffs bring this suit for the return of said sum of \$225.00 converted by the defendant to its own use, as hereinabove set forth."

Defendant's verified defense states:

"1. As to paragraph 1 of the Statement of Claim, defendant has no knowledge as to whether plaintiff made the payments in the sums and on the dates as set forth therein. Defendant states that it received \$275.00 on September 12, 1936, \$150.00 on September 30, 1936, and \$100. on October 1, 1936; said payments were received on account of the labor and material being furnished by the defendant to the building of the plaintiffs at the times and during the period

100.00
100.00

100.00

on the reverse side the following:

"Previous Total - \$200.00 for same, now
and Housekeeper,

All Total - \$200.00

"The Plaintiff further states that when the

returned to the plaintiff from one, E. Brown, who, on the date
aforesaid was an agent of the defendant, the sum of \$100.00 out of
said \$200.00, to be held in escrow as aforesaid, leaving the sum
of \$100.00 in the hands of the defendant to be applied by the
defendant in the manner hereinbefore set forth, as was agreed.

"The Plaintiff further states that when the

and refused to apply said money in accordance with the agreement,
and that on the contrary, the said defendant was maliciously, wil-
fully and unlawfully converted said money to his own use.

"The Plaintiff further states that when the

alleges upon the defendant as aforesaid that money, in accordance
with the agreement hereinbefore set forth, to be paid said money
to the plaintiff, but that the said defendant has refused and
failed to do so, and still persists in said refusal.

"Wherefore, plaintiff prays that the return of

said sum of \$200.00 converted by the defendant to his own use, as
hereinbefore set forth."

Defendant's verified defense states:

"1. As to paragraph 1 of the statement of claim, defendant

has no knowledge as to whether plaintiff made the payments in the
sums and on the dates as set forth therein. Defendant states that
it received \$275.00 on September 12, 1936, \$100.00 on September 30,
1936, and \$100.00 on October 1, 1936; said payments were received
on account of the labor and material being furnished by the defendant
in the building of the plaintiff's house and during the period

covered thereby. The said payments were collected by the salesman of the defendant, B. Brotman, who was the salesman on the said account at said time.

"2. Defendant denies that \$300.00 of the sums received by the defendant were to be used as set forth in paragraph 1. Defendant has no knowledge of the alleged receipt set forth therein. Defendant states that B. Brotman was merely a salesman of the defendant authorized to solicit business for the approval of the defendant. Said B. Brotman was not authorized to give such an alleged receipt nor was he authorized to receive any payments from customers of the defendant for the purpose of paying them to third persons, other than this defendant, his employer. Defendant states that it had no knowledge of the said alleged receipt at the date it bears or until a long time thereafterward, during to-wit 1937, after the defendant had completed furnishing its said labor and material.

"3. The promise to make payment to a third person other than this defendant in the said alleged receipt was without consideration as far as this defendant is concerned.

"4. Defendant has no knowledge of the matters set forth in paragraph 2 of the statement of claim except as it is informed thereby. Defendant states that such a repayment was without the knowledge or authority of the defendant.

"5. Said B. Brotman, ceased to be employed by the defendant during to-wit November, 1936.

"6. Defendant denies that it has maliciously, wilfully and unlawfully converted said monies to its own use and denies that it had any agreement to apply the said monies or any part thereof, with the plaintiffs or anyone on their behalf, to any use other than on account of the labor and material furnished by the defendant. Defendant states that it has furnished labor and material of a fair, reasonable

covered thereby. The said payments were collected by the defendant of the defendant, B. Brozman, who was the salesman on the said account at said time.

"2. Defendant denies that \$300.00 of the same was received by the defendant were to be used as set forth in paragraph 1. Defendant has no knowledge of the alleged receipt nor forth therein. Defendant states that B. Brozman was merely a salesman of the defendant and was used to solicit business for the approval of the defendant. Said B. Brozman was not authorized to give such an alleged receipt nor was he authorized to receive any payments from customers of the defendant for the purpose of paying them to third persons, other than this defendant, his employer. Defendant states that it had no knowledge of the said alleged receipt at the date it bore on until a long time thereafter, during 1937, after the defendant had completed furnishing its said labor and material.

"3. The promise to make payment to a third person other than this defendant in the said alleged receipt was without consideration as far as this defendant is concerned.

"4. Defendant has no knowledge of the matter set forth in paragraph 2 of the statement of claim except as it is informed there-by. Defendant states that such a payment was without the knowledge or authority of the defendant.

"5. Said B. Brozman, ceased to be employed by the defendant during 1937-1938.

"6. Defendant denies that it has maliciously, willfully and unlawfully converted said monies to its own use and denies that it had any agreement to apply the said monies or any part thereof, with the plaintiff or anyone on their behalf, to any use other than as stated of the labor and material furnished by the defendant. Defendant states that it has furnished labor and material of a fair, reasonable

cash market value in excess of the \$525.00 received by it.

"7. Defendant denies that it has converted any sum whatsoever and denies that it is indebted to the plaintiffs in any sum whatsoever."

Liberty Construction Company had done certain work on a building belonging to plaintiffs. It subsequently refused to go on with the work and "gave up the contract." The condition of the building made it dangerous to its occupants and to the public. Defendant was engaged in building construction work and Ben Brotman was one of its "salesmen." On September 2, 1936, at the office of plaintiffs' attorney, Brotman signed the following instrument:

"September 2, 1936

"The Best Built Company agrees to complete the repair work on premises located at 3339 S. Mospratt Street, Chicago, Illinois according to the plans submitted by Mr. and Mrs. John Wielgosiak for the sum of Thirty four hundred dollars \$3400.00. A loan of Three Thousand dollars has been approved by the Second Federal Loan Association. Falasz and Szarmach [attorneys for plaintiffs] will obtain an approval from the said association.

"Best Built Co.
By B. Brotman."

At the same time plaintiffs gave Brotman the plans of the former contractor. Defendant obtained a permit for the work and did certain work upon the building, but about the latter part of October, 1936, because of complaints by neighbors, the Building Department revoked the permit and permanently stopped the work.

Defendant contends that "I. Plaintiffs failed to meet the burden of proof to show that defendant's salesman was authorized by defendant to receive money from defendant's customers for payment to third parties. II. Plaintiffs were negligent in not inquiring as to the authority of defendant's salesman to receive money in escrow for third parties. III. Defendant had no knowledge of the special

...and denies that it is indebted to the plaintiffs in any way
whatsoever."

Liberty Construction Company had done certain work on a building
belonging to plaintiffs. It subsequently refused to go on with
the work and "gave up the contract." The condition of the building
made it dangerous to the occupants and to the public. Defendant was
engaged in building construction work and Ben Brozman was one of its
employees. On September 2, 1936, at the office of plaintiffs'

attorney, Brozman signed the following instrument:

"September 2, 1936

"The Best Buil Company agrees to complete the repair work

on premises located at 1212 E. Washington Street, Chicago, Illinois
according to the plans submitted by Mr. and Mrs. John A. Hirschman for
the sum of thirty four hundred dollars (\$3400.00). A loan of three
thousand dollars has been approved by the Second Federal Loan
Association. Nelson and Hirschman [attorneys for plaintiffs] will
obtain an approval from the said association.

"Best Buil Co.
By B. Brozman."

At the same time plaintiffs gave Brozman the plans of the former con-
tractor. Defendant obtained a permit for the work and did certain work
upon the building, but about the latter part of October, 1936, because
of complaints by neighbors, the Building Department revoked the
permit and permanently stopped the work.

Defendant contends that "I, plaintiffs failed to meet the
burden of proof to show that defendant's salesman was authorized by
defendant to receive money from defendant's customers for payment
of third parties. II. Plaintiffs were negligent in not insuring
as to the authority of defendant's salesman to receive money in return
for third parties. III. Defendant had no knowledge of the agent

receipt signed by its salesman."

Plaintiffs contend that defendant clothed Brotman with apparent authority to act for it in the matter in question and is bound by his acts; that the evidence shows that Brotman acted for defendant in the said matter, or, at least, that he acted with the knowledge and acquiescence of defendant.

Stanley E. Szarmach, attorney, represented plaintiffs during August and September, 1936, in reference to the dealings with defendant. He was connected with building associations and had entered into a number of building contracts with defendant through Brotman prior to the transactions in question. He had always paid defendant on account of these prior jobs through Brotman, and the latter had executed receipts "on behalf of the Best Built Company." Plaintiffs introduced in evidence the receipt of September 30, 1936, set up in their statement of claim, and it is conceded that Brotman received the \$300 in question and that he agreed with Szarmach that the \$300 was to be applied on the accounts of Wendt and the cement man, subcontractors, both of whom had done work on the building and held liens on the property. Brotman, called by defendant, testified that he received the \$300 from plaintiffs to pay these subcontractors. That Brotman turned over the \$300 to Miss Shaffer, the secretary of defendant and its cashier, is conceded. Defendant claims that when Brotman turned over the money to Miss Shaffer he gave her no instructions to hold the money for any special purpose and told her nothing about his agreement with plaintiffs; that the payments in question were received by defendant on account of labor and material being furnished by it on plaintiffs' building. Defendant undertook to show that A. I. Lurya, its vice president, was the general manager of the company; that he was "in charge of the entire organization - its owner," and that no one else connected with the company, not even its secretary, had authority to bind defendant in the matter of contracts or agreements without his approval. Lurya, in support of this

position, testified that Minnie Shaffer, secretary of defendant, was an officer of the company "just only for convenience;" that she had been in his employ for thirteen years "as a switchboard operator and typist." Both Brotman and Miss Shaffer, who testified for defendant, attempted to support defendant's theory of fact that Lurya was the sole person connected with defendant company who had the right to make contracts or agreements unless the same had been approved by Lurya. To quote from Miss Shaffer's testimony: "Q. Mr. Brotman, when he was there collected money and turned it over to you? A. Yes, sir. * * * Q. He was authorized to do that, was he not, to collect money on behalf of the Best Built Company and then bring it back to you? A. I don't know if he was authorized. Q. He did it continually, didn't he, on this job and other jobs? A. He used to bring in these deposits, yes, sir. Q. And there was never any question raised, was there, as to his authority to do that? A. Well, all the salesmen would bring in their deposit on their contracts. Q. And at this time and previous to this time of September, 1936, Mr. Brotman signed contracts on behalf of the Best Built Company, is that right? A. All the salesmen do, yes, sir. Q. They have the authority to sign contracts for the Best Built Company? A. They signed them. Q. Then the Best Built Company would go ahead and perform on those contracts? A. No, they would have to be authorized by an officer of the company. Q. But they signed on behalf of the company? A. That was the arrangement. Q. And Mr. Brotman collected money for the company and gave the company's receipt for it? A. No, he used to bring in the money to me and then I would give him a receipt for it. * * * Q. Did he ever execute any receipts? A. Did he ever execute? No. Q. At the time he got the money? A. No. Q. People just handed him money without getting any receipt for it, is that right? A. I wouldn't know. When he handed it to me, I gave him a receipt for it."

After reading the entire transcript of the evidence we are

After reading the entire transcript of the evidence we are

A. I wouldn't know. When he handed it to me, I gave him a receipt handed him money without getting any receipt for it, is that right?

Q. Is the time he got the money? A. No. Q. People just

*** Q. Did he ever execute any receipts? A. Did he ever execute?

bring in the money to me and then I would give him a receipt for it.

the company and gave the company's receipt for it? A. No, he used to

A. That was the arrangement. Q. And Mr. Brozman collected money for

officer of the company. Q. But they signed on behalf of the company?

on these contracts? A. No, they would have to be authorized by an

signed them. Q. Then the West Hill Company would go ahead and perform

authority to sign contracts for the West Hill Company? A. They

to that extent. A. All the evidence is, yes, sir. Q. That was the

1932, Mr. Brozman signed contracts on behalf of the West Hill Company,

contracts. Q. And at this time and previous to this time of September,

A. Well, all the evidence would bring in their deposit on their con-

never any question raised, was there, as to his authority to do that?

A. He used to bring in these deposits, yes, sir. Q. And there was

Q. He did it continually, didn't he, on this job and other jobs?

then bring it back to you? A. I don't know if he was authorized.

he not, to collect money on behalf of the West Hill Company and

to you? A. Yes, sir. *** Q. He was authorized to do that, was

Mr. Brozman, when he was there collected money and turned it over

approved by Emrys. To quote from Miss Shaffer's testimony: "Q.

the right to make contracts or arrangements unless the same had been

Emrys was the sole person connected with defendant company who had

for defendant, attempted to support defendant's theory on that fact

operator and typist." Both Brozman and Miss Shaffer, who testified

she had been in his employ for thirteen years "as a wife and

was an officer of the company "just only for convenience;" that

testimony, testified that Miss Shaffer, secretary of defendant,

satisfied that the trial court was justified in rejecting defendant's position that Lurya was the only person connected with defendant who had the power to make contracts or agreements. Defendant was a corporation and Miss Shaffer was its secretary. The evidence shows that she was its cashier; that she signed defendant's checks; and the printed form of check used by it shows that its checks were to be signed by its secretary only. She executed waivers of liens on behalf of defendant "as a general thing." Although she first stated that when Lurya was present in the office she would usually take up the matter of waivers with him, she finally admitted that she had been authorized by Mr. Lurya to execute waivers in her discretion. She further testified that she executed the waiver of lien made by defendant in reference to plaintiffs' property and that she did not think that she consulted Lurya in reference to the matter. From a reading of the entire evidence it seems reasonably clear that Miss Shaffer in addition to being secretary of defendant company was its general utility employee. Szarmach testified that Brotman told him and plaintiffs to come over to defendant's office, "that he would have the sub-contractors there, that is, the house raiser and the concrete man, and that they had filed a lien against the premises and they had by a stop order with the Building Trades Council - * * * that there is a stop order on the job, that they couldn't continue or begin to work on there unless these sub-contractors were taken care of, so I told her to bring \$600, which was a figure that we had agreed on, and the house raiser and the concrete man had more than \$300 coming between them, and after a lot of negotiations they finally agreed to accept \$150 each, and the money was deposited with Mr. Brotman in the presence of this lady [Miss Shaffer] there at one of the private offices;" that at this meeting in defendant's office, in addition to Brotman, plaintiffs, Szarmach, the concrete man, the house raiser, and Miss Shaffer were there. Miss Shaffer admits that at this meeting Brotman dictated to her the following instrument:

...that the trial court was justified in rejecting defendant's position that there was no conspiracy with defendant in had the power to make contracts or agreements. Defendant was a corporation and Miss Shafter was its secretary. The evidence shows that she was its cashier; that she signed defendant's checks; and the printed form of check used by it shows that the checks were to be signed by its secretary only. The executed waivers of liens on behalf of defendant "as a general thing." Although she first stated that when Lunge was present in the office she would usually take up the matter of waivers with him, she finally admitted that she had been authorized by Mr. Lunge to execute waivers in her discretion. She further testified that she executed the waiver of lien made by defendant in reference to plaintiff's property and that she did not think that she omitted Lunge in reference to the matter. From a reading of the entire evidence it seems reasonably clear that Miss Shafter in addition to being secretary of defendant company was its general utility employee. Gammach testified that Brown told him and plaintiff to come over to defendant's office, "that he would have the sub-contractors there, that is, the house raiser and the concrete man, and that they had filed a lien against the premises and they had by a stop order with the Building Trades Council - * * * that there is a stop order on the job, that they couldn't continue on begin to work on there unless these sub-contractors were taken care of, so I told her to bring \$600, which was a figure that we had agreed on, and the house raiser and the concrete man had more than \$300 coming between them, and after a lot of negotiations they finally agreed to accept this sum, and the money was paid out of the money in the possession of Miss Shafter."

Shafter there at one of the private offices? That at this meeting in defendant's office, in addition to defendant, plaintiff, Gammach, the concrete man, the house raiser, and Miss Shafter were there. Miss Shafter admits that at this meeting Brownman dictated to her

"Chicago, Illinois
September 30, 1936

"Best Built Company
Chicago, Ill.

"Gentlemen:

IN RE: Wielkosiak Job at
3339 Mosspratt Ave.,
Chicago, Ill.

"I do hereby agree to accept the sum of One Hundred Fifty Dollars (\$150.00) for raising and shoring done on property described above, which pays in full for all materials and labor delivered to date.

"I also state that all men employed by me on this job have been paid.

"By receiving \$150.00, I will waive all lien rights against this property.

"This settlement also takes care of Mr. Brink who worked together with me on this job.

"(SIGNED) F. Wendt"

that she took the dictation "word for word" as he gave it to me and I went back to my desk to write it out." After reading the entire testimony of Miss Shaffer we find that she did not deny the testimony of Szarmach that the money paid at that meeting was deposited with Brotman in her presence. Brotman testified that the sub-contractors were present at the meeting and that when he received the money to take care of their liens he turned it over to Miss Shaffer but that he gave her no instructions to hold the money for any special purpose. It is conceded that at this meeting the following receipt was given by Brotman:

"September 30 1936

"Received of John Wielkosiak
One Hundred and no/100 Dollars
To be applied on account of
Wendt - Rasing bill.

"\$100.00

"Best Built Co.
B. Brotman"

On the back of that receipt Brotman at the same time wrote the follow-

September 30, 1936

"Best Buick Company
Chicago, Ill.

IN RE: Michael J. Murphy
3330 North Ave.
Chicago, Ill.

"Gentlemen:

"I do hereby agree to accept the sum of One Hundred Fifty Dollars (\$150.00) for training and showing done on property described above, which pays in full for all materials and labor delivered to date.

"I also state that all men employed by me on this job have been paid.

"By receiving \$150.00, I will waive all lien rights against this property.

"This settlement also takes care of all bills due and owing together with me on this job.

"(SIGNED) E. Murphy"

that she took the dictation "word for word as he gave it to me and I went back to my desk to write it out." After reading the entire testimony of Miss Shafter we find that she did not say the testimony of Michael that the money paid at that meeting was deposited with Michael in his possession. Michael testified that the sub-committee were present at the meeting and that when he received the money to take care of their liens he turned it over to Miss Shafter but that he gave her no instructions as to how the money for the special purposes. It is noted that at this meeting the following receipt was given:

By Michael:

"September 30 1936"

"Received of John Michael
One Hundred and Fifty Dollars
to be applied as interest on
loan - Michael Bill.

"Best Buick Co.
Chicago, Ill.

"\$150.00

On the back of this receipt Michael of the sum of One Hundred Fifty-

ing: "Previous Paid 200.00 for Cement man and House Raizer All
Total 300.00."

The trial court saw the witnesses and heard the testimony and we are satisfied that he was justified in finding that defendant clothed Brotman with apparent authority to act for it in the matter of the agreement to receive the \$300 for taking care of the liens of the subcontractors, and that Miss Shaffer knew the nature of the agreement and the purpose for which the money was received. When the entire evidence is carefully analyzed it seems difficult to believe that Mr. Lurya knew nothing about the agreement in question. From his years of experience in the building construction business he knew that before plaintiffs could obtain the \$3,000 from the loan association to complete the work, it would be necessary to secure waivers from all parties having lien claims against the building. To further the obtaining of the loan, defendant, through Miss Shaffer, executed a waiver of lien, but Miss Shaffer testified that she did not think that she consulted Mr. Lurya in reference to the waiver. Unless plaintiffs secured the loan from the loan association they would be unable to pay defendant for any work it might do upon the building. On September 2, 1936, Brotman executed the written contract with plaintiffs by the terms of which defendant agreed to complete the repair work on the building for \$3,400, yet Lurya testified that Brotman did not bring that contract to defendant's office and that defendant's work on the building was done without a contract.

We are satisfied that the judgment of the Municipal court of Chicago in the instant case is a just one and it is accordingly affirmed.

JUDGMENT AFFIRMED.

Sullivan, P. J., and Friend, J., concur.

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the 2nd day of May, in the
year of our Lord one thousand nine hundred and thirty-nine,
within and for the Second District of the State of Illinois:

Present -- The Hon FRANKLIN R. DOVE, Presiding Justice

Hon. FRED G. WOLFE, Justice

Hon. BLAINE HUFFMAN, Justice

JUSTUS L. JOHNSON, Clerk

E. J. WELTER, Sheriff

302 I.A. 115

BE IT REMEMBERED, that afterwards, to-wit: On AUG 25 1939
the Opinion of the Court was filed in the Clerk's Office of said
Court, in the words and figures following, viz:

In the Appellate Court of Illinois

Second District

May Term, A. D. 1939

Raymond Miollis,
Plaintiff-Appellant,

vs.

Maze Lactic Cultures, Inc., a
corporation, A. E. Johnson,
George Hove, F. Camp, Chris
Nelson, Will Hansen, H. N.
Wing, H. C. Reimer, Ole Nelson,
Martin Nelson, G. A. Stimes,
Lewis Kleive, W. N. Sherwin,
Fred Lange and Henry W. Kunde,
Plaintiffs-Appellees,

Pure Milk Association, an Illi-
nois corporation, Don N. Geyer,
Kenneth M. Boyer, John P. Case,
Frank J. Green, Albert J. Mathison,
Christian Francke (sued as Christ
Francke), Amos Smith, Harry A.
Pfister and Pure Milk Dairy Pro-
ducts, Inc., a corporation exist-
ing under and by virtue of the laws
of the State of Illinois,
Defendants-Appellees.

Appeal from the Circuit

Court of McHenry County

WOLFE, J.

On October 11, 1934, Raymond Miollis and others, filed in the Circuit Court of McHenry County, their complaint in chancery praying for an accounting, specific performance, damages and the appointment of a receiver for a corporation in which the complaint alleged some of the plaintiffs and defendants were interested. The case has not been heard on its merits, but the sole question being one of venue, which is based on the residence of the defendants.

On October 26, 1934, each defendant filed an appearance in writing. On November 5, 1934, each defendant filed motions to dismiss the complaint on the grounds that the complaint did not state a cause of action nor a joint cause of action against any of the defendants. The court heard the motions on March 23, 1938, and on that date dismissed the complaint for want of equity, as to four defendants who were residents of McHenry County, on the ground that

1994-1995 1995-1996

Plaintiff-Appellant, Raymond Willis,

EV

Wayne Lastic Cultures, Inc.,
 Corporation, A. E. Johnson,
 George Howe, W. Camp, Olin
 Nelson, Bill Nelson, A. E. Nelson,
 W. D. Nelson, G. A. Nelson,
 Martin Nelson, G. A. Nelson,
 L. A. Nelson, G. A. Nelson,
 Fred Nelson and Henry A. Nelson,
 L. A. Nelson, G. A. Nelson,

Pure Milk Association, an Illinois corporation,
has as its officers, Don W. Geyer,
President; Royer, John P., Cashier;
Geyer, J. O. son, Albert J. Mathison,
Director at Frankfort (said as Christ
Geyer), Amos Smith, Harry A.
Miller and Pure Milk Dairy Pro-
ducts, Inc., a corporation exist-
ing under and by virtue of the laws
of the State of Illinois,
Defendants-Appellees.

2. FL209

one of various, which is based on the testimony of the defendants. There has not been heard on the matter, but the sole question being alleged some of the plaintiffs and defendants were interested. The appointment of a receiver for a corporation in which the plaintiff is for an accounting, specific performance, damages and the in the United States of Maryland County, their complaint is admitted on December 11, 1934, before William H. Jones, Clerk.

On October 28, 1934, each defendant filed an appearance in writing. On November 2, 1934, each defendant filed motions to dismiss the complaint on the grounds that the complaint did not state a cause of action nor a joint cause of action against any of the defendants. The court heard the motions on March 23, 1935, and on that date dismissed the complaint for want of equity, as so found.

no relief was prayed in the complaint against them. The court apparently concluded that the said four defendants were all the defendants to the action residing in McHenry County. Upon motion of counsel for non-resident defendants, including the defendant, Pure Milk Association, a corporation, whose status as a resident of McHenry County is disputed by the parties, the court dismissed the complaint for want of jurisdiction of all defendants. (Vide, Sec. 7, Civil Practice Act.)

There is a presumption that a court of general jurisdiction has jurisdiction over the person of a defendant to a suit brought in such court. (Kenney v. Greer, 13 Ill. 432; Comrs. of Drainage Dist. v. Griffin et al, 134 Ill. 330). If a defendant makes a motion to strike the complaint because it does not state a cause of action against any defendant, he invokes the exercise of the jurisdiction of the court on the merits of the case, and he thereby submits the jurisdiction over his person to the court. Such a motion is in the nature of a general demurrer. (Ladies of Maccabees v. Harrington, 227 Ill. 511; The People vs. Mussatto, 216 Ill. App. 550; Brandt v. St. Paul Mercury Indem. Co., 285 Ill. App. 212; People for the use of White v. White, 263 Ill. App. 425; see, also Rule 21, Supreme Court Rules of Practice and Procedure). It is our opinion that by making such a motion that a defendant appears generally and defends the action on the merits. Under section 48 of the Civil Practice Act, a motion to dismiss the cause of action because the court has not jurisdiction of the person of the defendant, should so state and specify the grounds for the motion. No such motion was made in this case, nor has an answer been filed to the complaint.

The order entered on March 23, 1938, dismissing the complaint at plaintiffs' costs on the ground that the court had no jurisdiction, was erroneous as a question of law, and was a final

and appealable order. (Chicago Title & Trust Co. v. Tilton, 256 Ill. 97; Wormley v. Wormley, 207 Ill. 411; Cohen v. Moore, 59 Ill. App. 396; Windett v. Murphy, 50 Ill. App. 595; Morgan v. Campbell, 54 Ill. App. 242).

On June 13, 1938, the plaintiffs filed a motion, supported by affidavit, to vacate the order entered on March 23, 1938, and for leave to amend the complaint. On July 11, 1938, the motion was denied. Plaintiffs after the denial of the motion were permitted to introduce testimony relative to the business conducted by the Pure Milk Association in McHenry County. This testimony was presented in support of the allegation of the complaint that the Association was doing business in said county, and on the theory of the plaintiffs, that if the Association was a resident of the county when the action was brought, all the non-resident defendants were properly joined as defendants with the Association.

Notice of appeal was filed August 31, 1938, and the plaintiffs ask for the reversal of the orders entered on March 23, and July 11, 1938.

Paragraph 7 of sec. 50 of the Civil Practice Act is as follows: "The court may in its discretion before final judgment, set aside any default, and may within thirty days after entry thereof, set aside any judgment or decree, upon good cause shown by affidavit, upon such terms and conditions as shall be reasonable." Said section 50 supersedes section 58 of the Practice Act of 1907, and section 17 of the Chancery Act (Chap. 22.) (Both of which have been repealed.) Section 58 of the Practice Act of 1907 provided as follows: "The court may, in its discretion, before final judgment, set aside any default, and may during the term, set aside any judgment upon good and sufficient cause, upon affidavit, upon such terms and conditions as shall be deemed reasonable." It has never been the law that after the term has expired at which a suit was

and the law that after the term has expired at which a writ was
granted upon good and sufficient cause, upon affidavit, upon such
terms, and under any default, and may during the term, set aside any
judgment or decree, and condition as shall be deemed reasonable." It has never
been repealed.) Section 88 of the Practice Act of 1907 provided
that section 17 of the Chancery Act (Chap. 22.) (Both of which have
since been repealed) superseded section 88 of the Practice Act of 1907,
and upon such terms and conditions as shall be reasonable."

"The court may in its discretion before final judgment,
set aside any default, and may within thirty days after entry there-
of, set aside any judgment or decree, upon good cause shown by affi-
davit, and may during the term, set aside any judgment or decree, and
condition as shall be deemed reasonable." It has never
been repealed.) Section 88 of the Practice Act of 1907 provided
that section 17 of the Chancery Act (Chap. 22.) (Both of which have
since been repealed) superseded section 88 of the Practice Act of 1907,

Paragraph 7 of sec. 50 of the Civil Practices Act is as
follows: "The court may in its discretion before final judgment,
set aside any default, and may within thirty days after entry there-
of, set aside any judgment or decree, upon good cause shown by affi-
davit, and may during the term, set aside any judgment or decree, and
condition as shall be deemed reasonable." It has never
been repealed.) Section 88 of the Practice Act of 1907 provided
that section 17 of the Chancery Act (Chap. 22.) (Both of which have
since been repealed) superseded section 88 of the Practice Act of 1907,

Notice of appeal was filed August 31, 1938, and the
plaintiffs asked for the reversal of the orders entered on March 23,
and July 11, 1938.

The plaintiffs ask for the reversal of the orders entered on March 23,
and July 11, 1938.

Plaintiffs joined as defendants with the Association.
When the action was brought, all the non-resident defendants were
the plaintiffs, that if the Association was a resident of the county
Association was doing business in said county, and on the theory of
presented in support of the allegation of the complaint that the
the Pure Milk Association in McHenry County. This testimony was
admitted to introduce testimony relative to the business conducted by
was denied. Plaintiffs after the denial of the motion were per-
mitted to leave to amend the complaint. On July 11, 1938, the motion
by affidavit, to vacate the order entered on March 23, 1938,
On June 15, 1938, the plaintiffs filed a motion, supported

dismissed that the court had jurisdiction to enter an order vacating an order of dismissal and re-instating the case. Gray v. Ames, 220 Ill. 251; The People v. Weinstein, 298 Ill. 264. The motion to vacate the order entered on March 23, 1938, having been made more than thirty days after the order was entered, the court did not have jurisdiction to vacate that order.

The judgment of the trial court is affirmed.

Affirmed.

dismissed that the court had jurisdiction to enter an order vacating an order of dismissal and re-instating the case. Gray v. Ames, 230 Ill. 231; The People v. Weinstein, 238 Ill. 284. The motion to vacate the order entered on March 23, 1933, having been made more than thirty days after the order was entered, the court did not

have jurisdiction to vacate that order.

The judgment of the trial court is affirmed.

Affirmed.

STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and thirty-_____

Clerk of the Appellate Court

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the 2nd day of May, in the
year of our Lord one thousand nine hundred and thirty-nine,
within and for the Second District of the State of Illinois:

Present -- The Hon FRANKLIN R. DOVE, Presiding Justice

Hon. FRED G. WOLFE, Justice

Hon. BLAINE HUFFMAN, Justice

JUSTUS L. JOHNSON, Clerk

E. J. WELTER, Sheriff

302 I.A. 115²

BE IT REMEMBERED, that afterwards, to-wit: On SEP 19 1940
the Opinion of the Court was filed in the Clerk's Office of said
Court, in the words and figures following, viz:

THE UNIVERSITY OF CHICAGO
LIBRARY
1215 EAST 58TH STREET
CHICAGO, ILL. 60637
TEL. 733-4331
1961

THE UNIVERSITY OF CHICAGO
LIBRARY
1215 EAST 58TH STREET
CHICAGO, ILL. 60637
TEL. 733-4331
1961

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

October Term, A. D. 1938.

Otto G. Kasnick,

Appellant

vs.

Ernest Saunders, et al.,

Appellees.

Appeal from the Circuit Court
of Lake County.

DOVE, P.J.

On March 15, 1926 this suit was instituted by Otto G. Kasnick, doing business as Buena Plumbing and Heating Company, to foreclose a mechanic's lien against property owned by Ernest Saunders and Antoinette V. Saunders, his wife. The bill alleged that there was due the complainant a balance of \$355.00 upon a contract which he had entered into with J.P. McDonald who was a subcontractor under the general contractor F.O. Johnson with whom Mr. and Mrs. Saunders had entered into a contract for the erection of a dwelling house on certain described lots in Highland Park. The defendants relied upon a waiver of his lien executed by the complainant on October 10, 1925. The cause was referred to a special master who took the evidence and reported that the plaintiff had waived his lien and the court, after overruling plaintiff's exceptions to the report of the Master, entered a decree dismissing the bill of complaint for want of equity and from that decree this appeal is prosecuted.

The evidence disclosed and the special master found that appellees were, on September 1, 1925, the owners of the real estate described in the complaint; that they entered into a contract with F.O. Johnson to erect a dwelling thereon; that Johnson entered into a sub-contract with J.P. McDonald who entered into a sub-contract with appellant, who was a plumber and steam fitter, by the provisions of which appellant was to do certain plumbing, gas fitting and sewerage work for \$995.00;

IN THE
APPELLATE COURT OF ILLINOIS

October 15, A. D. 1938.

OTTO G. KENNEDY,

Appellant from the Circuit Court

of Lake County.

vs.

ERNEST SANDERS, JR.,

Appellee.

DOVE, F. F.

On March 15, 1938 this suit was instituted by Otto G. Kennedy, doing business as Ernest Sanders and Heating Company, to foreclose a mechanic's lien against property owned by Ernest Sanders and Antoinette V. Sanders, his wife. The bill alleged that there was due the complainant a balance of \$853.00 upon a contract which he had entered into with T. F. McDonald who was a subcontractor under the general contractor T. O. Johnson with whom Mr. and Mrs. Sanders had entered into a contract for the erection of a dwelling house on certain described lots in Highland Park. The defendants relied upon a waiver of his lien executed by the complainant on October 10, 1935. The cause was referred to a special master who took the evidence and reported that the plaintiff had waived his lien and the court, after overruling plaintiff's exceptions to the report of the Master, entered a decree dismissing the bill of complaint for want of equity and from that decree this appeal is prosecuted.

The evidence disclosed and the special master found that appellees were, on September 1, 1935, the owners of the real estate described in the complaint; that they entered into a contract with T. O. Johnson to erect a dwelling house; that Johnson entered into a sub-contract with T. F. McDonald and entered into a sub-contract with appellee, Otto G. Kennedy, a plumber and steam fitter, by the provisions of which appellee was to erect a dwelling house, the fitting and removal work for \$750.00;

that on December 18, 1925 the appellant and Antoinette Saunders, one of the appellees, made an agreement whereby appellant changed a roll rim sink to an apron sink and for so doing was to receive \$10.00; that appellant did this and completed the work called for by his contract on December 21, 1925; that on October 10, 1925 appellees paid him \$650.00 and that there remains a balance of \$355.00 due appellant; that at the time appellees paid appellant, said \$650.00, he executed the following instrument:

"Waiver of Lien
"State of Illinois)
) ss.
Cook County)

To all whom it may concern:

Whereas, we the undersigned Buena Plumbing and Heating Co., has been employed by J.P. McDonald to furnish Roughing in Plumbing materials, sewer work and labor for the building known as 1737-S. Greenbay Rd., Highland Park, Ill.

Now, therefore, know ye, that we the undersigned, for and in consideration of ten dollars, and other good and valuable considerations, the receipt ~~of~~ whereof is hereby acknowledged, do hereby waive and release any and all lien, or claim, or right of lien on said above described building and premises under 'An Act to revise the law in Relation to mechanics liens, approved May 18, 1903, and in force July 1, 1903' on account of labor or materials, or both, furnished, or which may be furnished by the undersigned to or on account of the said J.P. McDonald for said building or premises.

Given under my hand and seal this 10th day of Oct. 1925.

Buena Plumbing and Heating Co. (SEAL)
Otto Kasnick (SEAL)"

The special master further found that by this instrument appellant waived his lien for all labor or materials furnished or which might thereafter be furnished appellees by appellant; that there was no evidence introduced which tended to indicate that said waiver was intended only as a partial waiver of appellant's lien, nor was there any evidence which disclosed the amount or value of any labor or material furnished after the execution of said instrument.

It is the contention of appellant that under his contract with McDonald, his work consisted of doing two things, first, "roughing in" and second, "finishing"; that "roughing in" means the placing in the building of that part of the plumbing equipment which is con-

that on December 18, 1935 the appellant had introduced evidence
 one of the appellants, and in evidence which was introduced during
 a roll call in the court room and for no other reason than
 \$10.00; that appellant did not introduce the same until the
 of his arrest on December 18, 1935; that on December 10, 1935
 appellant paid his \$25.00 and that there remains a balance of
 \$250.00 and appellant; that at the time appellant paid appellant,
 said \$250.00, he executed the following instrument:

"Waiver of Lien
 State of Illinois)
) ss.
 Cook County)

To all whom it may concern:

Whereas, we the undersigned Burns Plumbing and
 Heating Co., have been employed by F. J. McDonald as
 high roughing in plumbing materials, sewer work and labor
 for the building known as 137-S. Broadway St., Highland
 Park, Ill.
 Now, therefore, know ye, that we the undersigned,
 for and in consideration of ten dollars, and other good
 and valuable considerations, the receipt of which is hereby
 acknowledged, do hereby waive and release any and all lien,
 or right of lien or claim of lien or other interest in
 and premises under 'an Act to revise the law in relation to
 mechanics' lien, passed March 18, 1908, and in force July
 1, 1908' on account of labor or materials, or both, fur-
 nished, or which may be furnished by us or our assigns to or
 on account of the said F. J. McDonald for said building or
 premises.
 Given under my hand and seal this 10th day of
 Oct. 1935.

Burns Plumbing and Heating Co. (SEAL)
 Otto Keschick (SEAL)

The special master further found that the instrument

appellant waived his lien for all labor or materials furnished or
 which might thereafter be furnished appellees by appellant; that
 there was no evidence introduced which tended to indicate that said
 waiver was intended only as a legal device of appellant's lien, and
 was there any evidence which disclosed the amount or value of any
 labor or material furnished after the execution of said instrument.
 It is the contention of appellant that under its contract with
 McDonald, his work consisted of doing two things, first, roughing
 in" and second, "finishing"; that "roughing in" means the laying
 in the building of that part of the plumbing system which is con-

cealed in the walls and under the floors and that "finishing" work means the installation of the plumbing fixtures; that by the terms of the instrument which he executed on October 10, 1925, he waived his lien for his work in roughing in the plumbing materials and making the sewer connections, but retained his lien for the plumbing fixtures and as upholding or supporting this construction calls our attention to *Burgoyne v. Pyle*, 261 Ill. App. 356. In the *Burgoyne* case the court said that the evidence disclosed that the wife of the lien claimant prepared the waiver of lien and that it was evident that the waiver was intended to be only a partial waiver for labor and materials and was so understood by all the parties. The court held that the wording of the waiver was ambiguous and applied the rule that in such cases the doubt would be resolved against the waiver, stating that if the parties had intended a full and complete waiver, ~~stating that~~ they should have evidenced it in unmistakable terms. In the *Burgoyne* case the waiver of a lien was limited by the words "to date" and the Court properly held that it did not waive the claimant's lien of labor and material furnished thereafter.

We fail to discover anything ambiguous in the provisions of this instrument. This instrument recites that appellant had been employed by McDonald to furnish "Roughing in Plumbing Materials, sewer wok and labor" for appellees' premises. After this recital and the statement of a consideration, appellant states he waives and releases any and all lien, claim or right of lien * * * on account of labor or materials, or both, which he has furnished or which may be furnished by him. To adopt appellant's construction of this waiver would be to entirely disregard a portion thereof. By appellant's contract with McDonald, he proposed not only to furnish all materials but to perform all the work necessary for the completion of the plumbing work in appellees' residence. The fixtures were enumerated. The contract did not separate the work by making any reference to "roughing in" or "finishing." The construction of the waiver which appellant contends for is not aided by a reference to the contract which he asks us to particularly examine. The decree appealed from is the only one warranted by the law and the evidence and it will therefore be affirmed.

DECREE AFFIRMED.

...in the walls and under the floors and that "finishing" work
...the installation of the plumbing fixtures; that by the terms of
the instrument which he executed on October 10, 1935, he waived his
claim for his work in roughing in the plumbing materials and making the
lower connections, but retained his lien for the plumbing fixtures and
as upholding or supporting this contention calls our attention to
Burgoyne v. Kyle, 361 Ill. App. 355. In the Burgoyne case the court
said that the evidence disclosed that the wife of the lien claimant
prepared the waiver of lien and that it was evident that the waiver
was intended to be only a partial waiver for labor and materials and
was so understood by all the parties. The court held that the wording
of the waiver was ambiguous and applied the rule that in such cases
the doubt would be resolved against the waiver, adding that if the
parties had intended a full and complete waiver, ~~xxxxxxxxxxxx~~ they
should have evidenced it in unmistakable terms. In the Burgoyne case
the waiver of a lien was limited by the words "to date" and the court
properly held that it did not waive the claimant's lien of labor and
material retained materials.

We fail to discover anything ambiguous in the provisions of this
instrument. This instrument recites that appellant had been employed
by McDonald to furnish "roughing in plumbing materials, lower work and
labor" for appellee's premises. After this recital and the statement
of a consideration, appellant states he waives and releases any and
all lien, claim or right of lien * * * on account of labor or materials,
or both, which he has furnished or which may be furnished by him. To
adopt appellant's construction of this waiver would be to entirely dis-
regard a portion thereof. By appellant's contract with McDonald, he
proposed not only to furnish all materials but to perform all the work
necessary for the completion of the plumbing work in appellee's
premises. The fixtures were enumerated. The contract did not separate
the work by making any reference to "roughing in" or "finishing." The
construction of the waiver which appellant contends for is not stated
by a reference to the contract which he asks us to gratuitously examine.
The contract recited that it is the only one warranted by the law and
the evidence that it will therefore be affirmed.

STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and thirty-_____

Clerk of the Appellate Court

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the 2nd day of May, in the
year of our Lord one thousand nine hundred and thirty-nine,
within and for the Second District of the State of Illinois:

Present -- The Hon FRANKLIN R. DOVE, Presiding Justice

Hon. FRED G. WOLFE, Justice

Hon. BLAINE HUFFMAN, Justice

JUSTUS L. JOHNSON, Clerk

E. J. WELTER, Sheriff

302 I.A. 143

BE IT REMEMBERED, that afterwards, to-wit: On SEP 19 1934
the Opinion of the Court was filed in the Clerk's Office of said
Court, in the words and figures following, viz:

Gen. No. 9404

Agenda No. 30

In the Appellate Court of Illinois

Second District

May Term, A. D. 1939

Alex Gust,

Appellant,

vs.

Sinclair Refining Company,
a corporation, and Mary
Stebley,

Appellees.

Appeal from the Circuit Court
of Lake County

HUFFMAN: J.

Appellant brought this action against the Sinclair Refining Company, a corporation, Mary Stebley and Walter R. Koch, for damages sustained by reason of falling into a greasing pit at a filling station located on the north-east corner of 10th and Utica streets in the City of Waukegan, Illinois. At the close of plaintiff's evidence, motions for directed verdicts in favor of the defendants, Sinclair Refining Company and Mary Stebley, were granted. The cause as to the defendant Koch was submitted to the jury and verdict returned in favor of appellant and against Koch for \$250. Appellant appeals from the action of the trial court in granting motions for instructed verdicts as to the Sinclair Refining Company and Mary Stebley.

Mary Stebley was the owner of the premises upon which the filling station was located. She had leased same to the Sinclair Refining Company in May, 1934. It appears that the Refining Company leased the premises to the defendant Koch on May 15, 1936.

On the night of January 5, 1937, appellant together with ten or eleven other boys assembled in the basement of the filling station building located on these premises. They were all students taking various courses from the International Correspondence School.

In the Appellate Court of Illinois

Second District

May Term, A. D. 193

Alma Gled

Appellant

Appeal from the Circuit Court

of Lake County

Sinclair Refining Company,
a corporation, et al.,
Respondents

Appellants

Number: 1

Appellant brought this action against the defendant
 Refining Company, a corporation, and against Alma Gled,
 for damages sustained by reason of falling into a vat of
 a filling station located on the north-west corner of 12th and
 Union streets in the city of Chicago, Illinois. At the time of
 plaintiff's accident, motion picture pictures were shown in the
 defendant's filling station and Alma Gled, who was
 the cause as to the defendant Refining Company was admitted to the jury and
 verdict returned in favor of appellant and against Refining Company.
 Appellant appeals from the action of the trial court in granting
 motions for instructed verdicts as to the Sinclair Refining Company
 and Alma Gled.

Alma Gled was the owner of the premises upon which the
 filling station was located. She had leased same to the Sinclair
 Refining Company in May, 1934. It appears that the Refining Com-
 pany leased the premises to the defendant Refining Company on May 15, 1935.
 On the night of January 2, 1937, plaintiff, Alma Gled, was
 on the premises when she was injured in the accident at the filling
 station located on Union street. She was not injured
 while viewing pictures from the International Governmental Building.

Harold E. Swanson was the representative of the correspondence school. He was present on the night in question and states that when he arrived at the filling station it was dark except for a night light located inside the building; that he entered the station and proceeded to the basement where he found appellant, together with some ten or eleven other boys who were taking courses of study with his company. He says that the students had a study club in order that they might help each other in pursuing their various courses of study.

When the meeting was over at about eleven or twelve o'clock, the students went upstairs from the basement of the filling station to return to their homes. The lights of the station had been extinguished prior to that time as the station was closed for business. One night light was burning inside the station building. The front door was locked and the students made their exit through a back door. Appellant after going through the back door and in his progress over the premises in question, fell into a greasing pit, where he sustained the injuries complained of. The complaint as it appears in the abstract does not set out the injuries received otherwise than that, "the plaintiff was injured, became permanently disabled and liable for a great amount of money." The only testimony by a physician or surgeon was Dr. George Callahan, who according to appellant's testimony, taped his side. The doctor's testimony is abstracted as follows: "Dr. George B. Callahan, witness for plaintiff, medical testimony in behalf of Alex Gust concerning health." It does not appear in the abstract either from the complaint or from the evidence what injuries the appellant received.

The defendant Koch did not attend the meeting. He knew they expected to have the meeting, and that one of his hired attendants, Zook, was a student of the correspondence school and intended to

Swanson was the representative of the correspondence school. He was present on the night in question and states that when he arrived at the filling station it was dark except for a night light located inside the building; that he entered the station and proceeded to the basement where he found appellants together with some ten or eleven other boys who were taking courses of study with his company. He says that the students had a study club in order that they might help each other in pursuing their various courses of study.

When the meeting was over at about eleven or twelve o'clock, the students went upstairs from the basement of the filling station to return to their homes. The lights of the station had been extinguished prior to that time as the station was closed for business. One night light was located inside the station building. The front door was locked and the students made their exit through a back door. Appellant attempting to go through the back door and in his progress over the premises in question, fell into a greasing pit where he sustained the injuries complained of. The complaint as it appears in the abstract does not set out the injuries received otherwise than that, "the plaintiff was injured, became permanently disabled and liable for a great amount of money." The only testimony by a physician or surgeon was Dr. George Callahan, who according to appellant's testimony, taped his side. The doctor's testimony is abstracted as follows: "Dr. George E. Callahan, witness for plaintiff, medical testimony in behalf of Alex Gust concerning 'health.' It does not appear in the abstract either from the complaint or from the evidence what injuries the appellant received. The defendant each did not attend the meeting. He knew that appellant was not the plaintiff, and that was at his first examination. That was a student at the correspondence school and intended to

attend the meeting after closing hours. There is nothing in the evidence to establish or tend to prove that the boys who assembled that night came there as customers or invitees of the place of business, insofar as appellees are concerned. The witness Kennel states they were there at the instance of Harold Swanson, agent for the International Correspondence School. None of them went there as a customer. They all left the premises by the same way. Grease pits are common equipment of filling stations. Appellant and the other students were present at the filling station on the night in question at the instance of Harold E. Swanson, a representative of the International Correspondence School. He had no connection with the business conducted at this place and was in no way connected with appellees.

Appellant urges that the lease from the Sinclair Refining Company to Koch was not such an instrument as to relieve the Refining Company from liability. Irrespective of this contention, the purpose of the meeting was so foreign to, and disconnected with, the business carried on at this place as to preclude the question of liability on the part of appellees, in the absence of knowledge on their part that the premises were being so used. We find nothing in the record to indicate it was the habit and custom of the students to meet here. Appellant states that he had never been at this filling station prior to the evening in question. His witness Sanford says that as far as he knows that was the only meeting ever held by the students at this station.

Finding no reversible error in the record, the judgment of the trial court is affirmed.

Judgment affirmed.

attend the meeting after closing hours. There is nothing in the evidence to establish or tend to prove what the do who assembled

that night came there as customers or invitees of the place of business, insofar as appellants are concerned. The witness stated they were there at the instance of Harold Gansman, agent for the International Correspondence School. None of them went there as a customer. They all left the premises by the same way. Gansman gave no common equipment of filling stations. Appellant and the other students were present at the filling station on the night in question at the instance of Harold E. Gansman, a representative of the International Correspondence School. He had no connection with the business conducted at this place and was in

on the night in question. Appellant urges that the loss from the Refining Company to Esch was not such an ingredient as to relieve the Refining Company from liability. Investigative of this contention the purpose of the meeting was so foreign to, and disconnected with, the business of the Refining Company as to require the knowledge on their part that the premises were being so used. As there is nothing in the record to indicate it was the habit and custom of the students to meet there. Appellant states that he had never been at this filling station prior to the evening in question. His witness Gansman says that as far as he knows that was the only meeting ever held by the students at this station. Finding no reversible error in the record, the judgment

of the trial court is affirmed.

Judge presiding.

STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and thirty-_____

Clerk of the Appellate Court

40648

E. W. BRADY,
(Plaintiff) Appellee,
vs.
E. D. MARSHALL,
(Defendant) Appellant,
BRADY'S STAMP SHOP, INC., a
corporation,
(Intervenor) Appellee.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

302 I.A. 159

MR. PRESIDING JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

On June 16, 1938, Brady (plaintiff) caused a judgment by confession to be entered against Marshall in the Municipal Court of Chicago for the sum of \$7720. The judgment was based on a promissory note for \$7500, dated February 24, 1938, due on or before one year from date with interest at 5 1/2%, to which was attached a power to confess judgment at any time thereafter. On August 4, on petition of Marshall the judgment was opened up and leave given him to plead, the judgment to stand as security and the petition to stand as an affidavit of merits. On August 26, plaintiff amended his statement of claim setting up grounds for attachment, charging fraud in that defendant had or was about to convey his assets in such a way as to hinder and delay his creditors. The writ of attachment issued and was levied on "five sealed and bound packages containing books of stamps". Marshall traversed the grounds set up in the affidavit for attachment. On September 1, 1938, Brady's Stamp Shop, Inc., a corporation, intervened and claimed it was the owner of the stamps levied on. The plaintiff answered denying the intervenor was the owner. The issues by the plaintiff and defendant on the grounds for attachment and the issues between the intervening corporation and the plaintiff as to the ownership of the stamps came on for hearing before Judge Schiller. The trial was before the court. Evidence was taken, an order entered sustaining the attachment

and there was a finding that the corporation intervenor was not the owner of the stamps levied on, and judgment upon these findings was entered on October 3. From these judgments Brady's Stamp Shop, Inc. filed its appeal on October 22, 1938. That is this appeal.

The issues arising out of the suit upon the note were not at that time tried or determined. These afterward came on for hearing before Judge Hayes and a jury. After considerable evidence had been taken, by agreement of the parties a juror was withdrawn and the cause submitted to the court. The court found for plaintiff and confirmed the judgment as of the date of its entry on June 15. This judgment of confirmation was entered before Judge Hayes on November 16, 1938. The judgment order directed that a general and special execution issue. Defendant filed notice of appeal on January 9, 1939.

The plaintiff, Brady, contends in this court that the judgment should be affirmed, and this contention can hardly be said to be in dispute on this record. The defense set up by Marshall in his petition to set aside the judgment, which petition stood as an affidavit of merits, was to the effect that the execution and delivery of the note sued on had been obtained from defendant by Brady by means of fraudulent representations. These representations were said to be that on February 24, 1938, plaintiff was a dealer in stamps and conducted a business under the name of Brady's Stamp Shop, Inc. in Chicago; that plaintiff on that date had sold this business to defendant through falsely representing that the stock exceeded a net wholesale value of \$20,000 without including good will, and that the stock was in first class, saleable condition; that Brady had in his business a lucrative trade and had been earning on the average of \$350 per month net during the year then past; that defendant was without previous experience in the stamp business, was ignorant of the real value of the stamps and the business, and

and there was a finding that the corporation had not the
owner of the stamps issued on, and judgment upon these findings was
entered on October 11, 1933. These facts were made known to the jury.

Filed its appeal on October 11, 1933. That is this appeal.
The issues arising out of the case upon the facts were not

at that time tried or determined. Issues of fact were not
heard before Judge Hayes and a jury. After considerable evidence
had been taken, by agreement of the parties a jury was withdrawn
and the case submitted to the court. The court found for plaintiff
and affirmed the judgment as of the date of its entry on June 15.

This judgment of confirmation was entered before Judge Hayes on
November 15, 1933. The judgment was affirmed that a general and
special execution issued. Plaintiff filed notice of appeal on
January 5, 1934.

The plaintiff, hereby, consents in this court that the
judgment should be affirmed, and this contention can hardly be said
to be in dispute on this record. The defense was in material in
its position to set aside the judgment, since plaintiff stated as an
affirmative defense, was in the record that the corporation was

guilty of the crime and had been indicted and convicted by
jury of same at Federal Court, Chicago, Illinois. This was
made public on the 15th of February 1934. Plaintiff had a right to

change and conducted a business under the name of Hayes & Son,
Chicago, Inc. in Chicago; that plaintiff on that date had said this
business to defendant through largely representative that the stock
exceeded a net wholesale value of \$100,000.00, including fees
will, and that the stock was in fact there, tangible, and that
that they had in his business a franchise which was not then existing
as the average of \$100 per month not during the year 1933.

That defendant was without previous agreement in the same business,
and payment of the price value of the stamps and the evidence, and

relied upon and was deceived by these representations, and bought the business and stock for \$10,000, paying \$2500 in cash and executing and delivering the note sued on for \$7500. Upon the trial before Judge Hayes, defendant testified to the representations as alleged in his petition or affidavit of merits and to the purchase by him of the business upon such representations. No testimony was offered, however, tending to show that these representations upon which he relied were in fact false. There was, therefore, a finding for plaintiff and judgment that the original judgment should be affirmed as of the date of entry. This judgment was entered on November 16, 1938. Defendant filed notice of appeal on January 9, 1939. On this record there is no justifiable reason for reversing the judgment. It will, therefore, be affirmed.

AFFIRMED.

O'Connor and McSurely, JJ., concur.

relied upon and was deceived by these representations, and bought
the business and stock for \$10,000, paying \$3000 in cash and ex-
changing and delivering the note sued on for \$7000. Upon the trial
before Judge Hayes, defendant testified to the representations as
allayed in his petition or affidavit of merits and to the purchase
by him of the business upon such representations. No testimony was
offered, however, tending to show that these representations upon
which he relied were in fact false. There was, therefore, a finding
for plaintiff and judgment that the original judgment should be
affirmed as of the date of entry. This judgment was entered on
November 16, 1932. Defendant filed notice of appeal on January 8,
1933. On this record there is no justifiable reason for reversing
the judgment. It will, therefore, be affirmed.

WITNESSES:

O'Donnell and McGinnis, Jr., counsel.

40707

FRANCES MERLE LONG WHITE, Admin-
istratrix, With Will Attached of
Estate of CARL MURRAY WHITE, Deceased,
Appellee,

vs.

CHANEX L. PARISH,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

302 I.A. 172

MR. PRESIDING JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

The administratrix sued to recover the sum of \$2506.98, by her statement of claim alleged to be due from defendant for certain loans. The transactions were alleged to have been nine in number, and nine items are attached to the affidavit of claim. The defendant filed an affidavit of merits in which he denied that he was indebted in the amount claimed. He admitted that in the lifetime of White, who died on December 7, 1937, he had borrowed money from him placing certain jewelry and other property with White as collateral security. Defendant denied that certain cards attached to the statement of claim were the permanent records of White and denied that the cards properly indicated jewelry pledged as security for the loans. Attached to the cards were certain notes purporting to be signed by defendant. As to some of the items defendant said the notes were not genuine, and that the signature thereto was not his. As to Items, 1, 2, 4, 5, 7 and 8, defendant averred that on the 14th day of December, 1935, in the lifetime of White, he came to an agreement by way of accord and satisfaction and delivered to White his note for \$500, due three years after date, with interest, in full payment thereof; that the note was accepted by White in full payment of the indebtedness set forth in these items, and that the signature was at that time torn from each of the notes except the one attached to Item 2. Defendant averred that he was willing to pay whatever sum might be due upon the delivery to him of the jewelry and property pledged as security for the indebtedness.

THE DEFENDANT'S ANSWER TO THE COMPLAINT OF THE PLAINTIFFS
IN THE MATTER OF THE ESTATE OF JAMES EARL RAY, DECEASED
JAMES EARL RAY, Defendant,
vs.
UNITED STATES OF AMERICA, Plaintiff.

Plaintiff's suit was begun on April 11, 1938. On October 8, thereafter, defendant filed a counterclaim asking damages to the amount of \$1000 on account of the alleged conversion by White of certain diamonds, an oriental rug, a ring and a chair belonging to defendant.

The cause was tried by a jury. At the close of the evidence the court, on motion of plaintiff, directed a verdict in favor of plaintiff on her claim for the amount of \$2414.75, and against defendant on his counterclaim. Judgment was entered on the finding, from which defendant appeals.

Defendant contends the court erred in receiving in evidence the memorandum cards, copies of which were attached to the statement of claim.

Plaintiff called Mae V. Hammond, who from April, 1931, until November, 1935, served White as an employee in his business and had charge of his office. She testified that it was customary to keep a record of loan transactions on numbered cards which were indexed; that each card contained a memorandum of the date of the loan, its amount, the collateral given, etc., and that usually the note of the borrower was attached to the card. She testified that eight of the nine cards attached to the statement of claim were made by her and the other one by Mr. White; that all the rest of the memoranda were in her handwriting and were made in the ordinary course of business, and so far as she knew were true and correct. After the work on the card was completed she said she attached the note of the borrower and put the note and memorandum in an envelope which was then filed in a safe. The cards, over objection of defendant, were admitted in evidence. The objection of defendant was that since the action was for money borrowed even books of account of the creditor would not be admissible. The trial judge was of the opinion that the evidence was admissible under Rule 166 of the Municipal court. That rule in substance is Section 3 of Chapter 51 of the statute on Evidence and Depositions. We hold

Plaintiff's suit was begun on April 12, 1935, and
October 2, 1935, and was continued until a judgment was entered
in favor of the amount of \$1000 on account of the alleged conversion
of the sum of \$1000, and a judgment was entered on the
balance of the amount of \$1000 on account of the alleged conversion
belonging to defendant.

The cause was tried by a jury. At the close of the evi-
dence the court, on motion of plaintiff, directed a verdict in
favor of plaintiff on her claim for the amount of \$1000, and
against defendant on his counterclaim. Judgment was entered on the
finding, from which defendant appeals.

Defendant contends that the jury was misled by the evidence
in the following manner, to wit: That the evidence in the
case was such as to show that the sum of \$1000 was loaned to the
plaintiff.

Plaintiff called the V. White, who was called, and
until November, 1935, served White as an employer in his business
and had charge of his office. She testified that it was customary
to keep a record of loan transactions on numbered cards which were
indexed; that each card contained a memorandum of the date of the
loan, its amount, the collateral given, etc., and that usually the
note of the borrower was attached to the card. She testified that
eight of the nine cards attached to the statement of claim were
made by her and the other one by Mr. White; that all the rest of
the memoranda were in her handwriting and were made in the ordinary
course of business, and as far as she knew were true and correct.
After the work on the card was completed she said she attached the
note of the borrower and put the note and memorandum in an envelope
which was then filed in a safe. The cards, ever objection of de-
fendant, were admitted in evidence. The objection of defendant
was that since the action was for money borrowed even books of
account of the creditor would not be admissible. The trial judge
and of the opinion that the evidence was admissible under Rule 108
of the Federal Rules. That rule in substance is Section 8 of
Chapter 41 of the Statutes of the United States, which reads:

that the evidence was not admissible for two reasons. In the first place, the notes from which Mae Hammond said she made the memoranda were the best evidence, and secondly, as plaintiff sued for money borrowed even books of account would not have been admissible under an exception to the general rule. Estate of Martine, 233 Ill. App. 94. The exception seems to be general. The authorities are collected in a note to Cross v. Amareth, 44 Wyo. 175, 9 Pac. (2d) 147, 84 A.L.R. 148. The court erred in admitting this evidence. More serious was the error of the court in instructing the jury to return a verdict for plaintiff on the claim and on the counterclaim and directing the amount of damages to be assessed. The court allowed every item of the claim except No. 1.

The defendant was called as a witness under section 195-A of the Municipal Court Act. He testified that a note for \$65.00, purporting to be signed by him and attached to Item 1 was forged; that Item 2 with a like note attached for \$142.50, together with four other notes attached to separate items, were on December 14, 1935, settled as to the balance due by his giving White a note for \$500 of that date, due in three years and without interest. He said he gave the new note to White on December 14, 1935, and that the note was secured by a diamond ring with three stones in it worth \$500. He said he was in error when he signed the affidavit of merits saying that Item 4, which was a note for \$56.00, was included in the compromise agreement of December 14, 1935. He admitted that a note dated April 11, 1934, bore his signature, and that it was not included in the settlement. A note of January 22, 1932, for \$256.50 was included, as was a note of February 4, 1936, for the amount of \$743.60. He admitted that the note of December 24th for \$50.00, attached to Item 9, was genuine and had not been paid.

As to Item 4, the evidence shows that the note attached to it was not signed by defendant but, as a matter of fact, by White, and that defendant never received the money for the alleged

loan. T. R. Russell, husband of White's daughter, gave evidence tending to corroborate defendant's testimony as to the \$500 note executed and delivered by defendant to White, according to defendant's testimony, on December 14, 1935. William C. Lund, in business with White for sixteen years, said he knew the handwritings of defendant and White. He further testified that the signature to each of the notes attached to Items 1, 2, 3, 4 and 5 was not that of defendant, but in each case was in the handwriting of White. Lund also testified to facts tending to show the conversion of the collateral of the defendant, as stated in the counterclaim. Mrs. Russell, daughter of White, testified to admissions made by her father to her shortly before his death which, if true, tended to show the conversion by him of this collateral. She also testified to alleged admissions of plaintiff. Violet Hartman, a former employee, also testified. She said the jewelry was at a pawn shop pawned in the name of Carl White, and that she took it out of pawn for him, paying \$56.00, which she received from him for that purpose. She further testified to admissions by plaintiff. The evidence of these admissions of White was admissible. Vogel v. Murphy, 182 Ill. App. 631; Adamsen v. Magnelia, 280 Ill. App. 418. The testimony of defendant, when examined by the adverse party, was not to be disregarded. Crowder v. Nuttall, 285 Ill. App. 254; Passenheim v. Reinert, 362 Ill. 576.

It is entirely clear that the trial judge did not believe much of this testimony. He frankly said that the defense and the counterclaim were impositions on the court. There was high feeling manifested by those interested in the suit and by some of the witnesses. Plaintiff was married to White a few days prior to his death. It is apparent his family did not approve. It is entirely possible, of course, that the evidence given for defendant is untrue. However, questions as to the veracity of witnesses and the probability and improbability of their evidence, etc. are for the triers of fact where trial is by jury. This has been decided so

... T. R. Russell, husband of White's daughter, gave evidence
... defendant's testimony as to the \$500 note
... executed and delivered by defendant to White, according to defend-
ant's testimony, on December 14, 1935. William C. Lund, in business
with White for sixteen years, said he knew the handwriting of
defendant and White. He further testified that the signature to
each of the notes attached to Items 1, 2, 3, 4 and 5 was not that
of defendant, but in each case was in the handwriting of White.
Lund also testified to facts tending to show the conversation of the
collateral of the defendant, as stated in the counterclaim. Mrs.
Russell, daughter of White, testified to admissions made by her
father to her shortly before his death which, if true, tended to
show the conversation by him of this collateral. She also testified
to alleged admissions of plaintiff. Violet Hartman, a former
employee, also testified. She said the jewelry was at a pawn shop
purchased in the name of Gary White, and that she took it out of pawn
for him, paying \$25.00, which she received from him for that pur-
pose. She further testified to admissions of plaintiff. The
evidence of these admissions of White was admissible. Ward v.
Ward, 132 Ill. App. 281; Adams v. McGee, 230 Ill. App. 415.
The testimony of defendant, when examined by the adverse party, was
not to be disregarded. Gowder v. Russell, 232 Ill. App. 235;
Ward v. Ward, 132 Ill. App. 281.
It is entirely clear that the trial judge did not believe
much of this testimony. He frankly said that the defense and the
counterclaim were impositions on the court. There was high feeling
manifested by those interested in the suit and by some of the wit-
nesses. Plaintiff was married to White a few days prior to his
death. It is apparent his family did not approve. It is entirely
possible, of course, that the evidence given for defendant is un-
true. However, questions as to the veracity of witnesses and the
credibility and impartiality of those witnesses, are not for the
jury to decide. This has been decided as

often it is unnecessary to cite authorities. For error in the admission of evidence and for error in instructing the jury to return a verdict, the judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

O'Connor and McSurely, JJ., concur.

other it is unnecessary to cite authorities. For when in the
 absence of evidence the court is instructed to find in
 favor of a party, the judgment is reversed and the cause remanded.

U'nderwood and Roberts, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

40798

DANIEL F. LYONS,
Plaintiff and Respondent,

vs.

CHARLES HAUMILLER,
Defendant and Petitioner.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

302 I.A. 172²

MR. PRESIDING JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

In an action for personal injuries upon trial by jury there was a verdict for defendant.

This is an appeal by the defendant from an order granting plaintiff's motion for a new trial. The procedure is under section 77 (1) of the Civil Practice Act (Smith-Hurd's Anno. Stats., chap. 110, par. 201, p. 195) and Supreme Court Rule 30, par. 259.30, pp. 579-80.

On February 4, 1936, plaintiff Lyons, who then lived at 4136 Washington boulevard in Chicago, while returning to his home at about 9:15 to 9:30 P.M., and while walking north at the intersection of Washington boulevard and Karlov avenue, was struck by a west bound automobile and severely injured. The boulevard runs east and west; the avenue north and south. Plaintiff at the time in question was returning to his home from the postoffice building at Canal and Van Buren streets, where he was employed in the Money Order Division. The driver of the automobile did not stop. Plaintiff was carried into the Paradise Arms Hotel nearby and later in the evening was taken by ambulance to St. Anne's Hospital. When injured he was given first aid by Dr. Avery, now dead, and at the hospital Dr. Gearin treated him. Plaintiff left the hospital on March 16 and was taken to Hines Hospital, operated by the government. (He had been in military service.) He remained

MR. JUSTICE ROBERT H. JACKSON DELIVERED THE OPINION OF THE COURT.

302 I.A. 172

CHANCERY COURT, COOK COUNTY.

CHARLES HANDEL, Defendant and Petitioner.

vs.

WILLIAM F. LYON, Plaintiff and Respondent.

In an action for personal injuries upon trial by jury there was a verdict for defendant.

This is an appeal by the defendant from an order granting plaintiff's motion for a new trial. The procedure is under section 77 (1) of the Civil Practice Act (Smith-Hurd's Anno. Stats., chap. 110, par. 301, p. 185) and Supreme Court Rule 50, par. 352.30, pp. 572-80.

On February 4, 1935, plaintiff Lyon, was then living at 4126 Washington boulevard in Chicago, while returning to his home at about 9:15 to 9:30 P.M., and while walking north at the intersection of Washington boulevard and Karlov avenue, was struck by a west bound automobile and severely injured. The boulevard runs east and west; the avenue north and south. Plaintiff at the time in question was returning to his home from the postoffice building at Canal and Van Buren streets, where he was employed in the Money Order Division. The driver of the automobile did not stop. Plaintiff was carried into the Paradise News Hotel nearby and later in the evening was taken by ambulance to St. Anne's Hospital. When injured he was given first aid by Dr. Avery, now dead, and at the hospital Dr. Geerin treated him. Plaintiff left the hospital on March 18 and was taken to Mines Hospital, operated by the Government. (He had been in military service.) He remained

in the Hines Hospital until May 21, 1936, when he was taken home in a taxicab. In August he returned to the hospital for further treatment. He came home a second time but for the third time went to the hospital. This was in February or March, 1937.

At the time plaintiff was injured defendant, Haumiller, was living at 810 August street in Elgin, Illinois, where he operated a garage. He owned a LaSalle car bought from the Kraft Motor Sales Company at Elgin. He had a state license for 1936. The number was 31473. He was accustomed to driving this automobile and sometimes his wife or his son would drive it.

On the trial, plaintiff testified that he saw the automobile which struck him as it was coming toward him; that he saw the license number; that he remembered the license was for 1936 (unusual at that time of the year) and saw the license plate number was 31473. He described the automobile as a sedan, brown or tan in color. He said he saw the driver was a man but was not able to identify him then or since. He did not know the make of the car.

Plaintiff says that on the way home he stopped at Thompsons Restaurant at 4010 Madison street, where he had a lunch and met a friend, John Marcus, who then lived at 4312 Washington boulevard. He says Marcus walked from the restaurant with him until he was injured.

Marcus testified he saw the auto coming, called "Look out", and jumped up on the curbstone. He says the coming auto hit Lyons, and that as the driver went under the arc light, about 7 feet from the corner where the witness was standing, he got the number of the car, which was 31473, and the license 1936. Marcus also testified that he wrote down the number of the car and a few days after the accident gave

in the Mines Hospital until May 21, 1936, when he was taken home in a taxicab. In August he returned to the hospital for further treatment. He came home a second time but for the third time went to the hospital. This was in February or March, 1937.

At the time plaintiff was injured defendant, Hammler, was living at 810 August street in Elgin, Illinois, where he operated a garage. He owned a LaSalle car bought from the Knott Motor Sales Company at Elgin. He had a state license for 1936. The number was 31478. He was accustomed to driving this automobile and sometimes his wife or his son would drive it.

On the trial, plaintiff testified that he saw the automobile which struck him as it was coming toward him; that he saw the license number; that he remembered the license was for 1936 (unnatural at that time of the year) and saw the license plate number was 31478. He described the automobile as a sedan, brown or tan in color. He said he saw the driver was a man but was not able to identify him then or since. He did not know the make of the car.

Plaintiff says that on the way home he stopped at Thompsons Restaurant at 4010 Madison street, where he had a lunch and met a friend, John Marone, who then lived at 4312 Washington Boulevard. He says Marone walked from the restaurant with him until he was injured.

Marone testified he saw the auto coming, called "look out", and jumped up on the curbstone. He says the coming auto hit Lyons, and that as the driver went under the curbstone, he got the number of the car, which was 31478, and the license 1936. Marone also testified that he wrote down the number of the car and a few days after the accident came

plaintiff a statement telling him that this was the number of the car. Plaintiff corroborates and says he, at that time, told Marcus he already had the number.

Raymond H. Collins was an investigator for insurance companies and sometimes employed by Mr. Litow, an attorney in Chicago. Plaintiff says that four days after the occurrence a man, giving the name of Collins and having his card, came to him at St. Anne's Hospital, told him he represented the defendant, Charles Haumiller, the man who hit him. Plaintiff says that this man gave him the address of Haumiller as 810 Augusta street, Elgin, Illinois. Plaintiff says that up to that time he had never heard of defendant Haumiller and that never before had he seen this man Collins or heard of him. Plaintiff further testified that the first time he came out of the Hines Hospital (about June 16 or 17) he was driven by a man named Sadler, who now lives in Los Angeles but then in Maywood, out to Elgin and called on defendant at his place of business. Plaintiff says he said to defendant: "Mr. Collins, who represented you, told me at St. Anne's Hospital on February 8, 1936, that you was the man that struck me." Plaintiff says defendant replied: "I was in the vicinity that night and felt a bump, but I didn't know I hit anybody." Plaintiff further says that at the request of defendant they then went to the office of a man named Jenks in Elgin, and that defendant said to Jenks in his presence that he "felt a bump as he passed that corner but he didn't know he hit anybody". It appears the office to which they were taken was that of defendant's insurance company represented by Jenks. Jenks is now dead; Sadler did not testify.

On the trial, Raymond H. Collins testified that

plaintiff a statement telling him that this was the number of the car. Plaintiff corroborates and says he, at that time, told Wilson he already had the number.

Plaintiff says that four days after the occurrence a man, giving the name of Collins and having his card, came to him at St. Anne's Hospital, told him he represented the defendant, Charles Hamilton, the man who hit him. Plaintiff says that this man gave him the address of Hamilton as 210 Augusta street, Elgin, Illinois. Plaintiff says that up to that time he had never heard of defendant Hamilton and that never before had he seen this man Collins or heard of him. Plaintiff further testified that the first time he came out of the Elgin Hospital (about June 15 or 16)

he was driven by a man named Sadler, who now lives in Los Angeles but then in Maywood, out to Elgin and called on defendant at his place of business. Plaintiff says he said to defendant: "Mr. Collins, who represented you, told me at St. Anne's Hospital on February 8, 1936, that you was the man that struck me." Plaintiff says defendant replied: "I

was in the vicinity four nights and told a bunch, but I didn't know I hit anybody." Plaintiff further says that at the request of defendant that he went to the office of a man named Jones in Elgin, and that defendant said to Jones in his presence that he "felt a bump as he passed that corner but he didn't know he hit anybody." It appears the office to which they were taken was that of defendant's

insurance company represented by Jones. Jones is now dead; Sadler did not testify.

On the trial, Raymond F. Collins testified that

he had never in his life spoken to plaintiff; that he did not see him at the hospital on February 8, 1936, and in fact was not there; that he first saw plaintiff in the court of Judge Graber in October, 1936. After this call by plaintiff on defendant, defendant received a letter from an attorney stating he represented plaintiff in his claim arising out of the injuries and asking that he advise as to the name of his insurance company and see that one of their representatives communicated promptly.

In October, there were proceedings in the Criminal Court growing out of this occurrence. Plaintiff testified there before Judge Graber. Mr. Litow, an attorney in Chicago, testified in the present suit that Healy, Beverly & Funk, attorneys, sometime in June, 1936, asked him to watch this case in the local court and to make an investigation; that he did so and assigned Mr. Collins to the work. He testified, however, he did not assign any investigator to this matter prior to July, 1936, and that he did not instruct anyone to see plaintiff in February, 1936. This suit was started July 22, 1937.

The defendant testified that he had a LaSalle sedan of which the license number was 31473. He produced the license plate bearing these figures and below the words "Illinois---1936". He said that on February 4, 1936, he was in Elgin and during all the day was not outside the city limits. In the evening, at the time of this occurrence, which was about 9:15 to 9:30 P.M., he was at home with his wife and two sons. He was not in Chicago on that date nor in the vicinity of the occurrence on that date. He said plaintiff called on him at his garage on June 15, 1936, which was Monday. He says plaintiff introduced himself as from Chicago and stated he was a postal inspector and asked

he had never in his life spoken to plaintiff; that he did not see him at the hospital on February 8, 1936, and in fact was not there; that he first saw plaintiff in the court of Judge Graber in October, 1936. After this call by plaintiff on defendant, defendant received a letter from an attorney stating he represented plaintiff in his claim against defendant and asking that he advise as to the name of his insurance company and see that one of their representatives communicated properly.

In October, there were proceedings in the Criminal Court growing out of this occurrence. Plaintiff testified there before Judge Graber. Mr. Litow, an attorney in Chicago, testified in the present suit that he, Beverly & Frank, attorneys, sometime in June, 1936, asked him to whom this case in the local court and to make an investigation; that he did so and assigned Mr. Collins to the work. He testified, however, he did not assign any investigator to this matter prior to July, 1936, and that he did not instruct anyone to see plaintiff in February, 1936. This suit was started July 27, 1937.

The defendant testified that he had a LaSalle sedan of which the license number was 31478. He produced the license plate bearing these figures and below the words "Illinois--1936". He said that on February 4, 1936, he was in High and during all the day was not outside the city limits. In the evening, at the time of this occurrence, which was about 8:15 to 9:30 P.M., he was at home with his wife and two sons. He was not in Chicago on that date nor in the vicinity of the occurrence on that date. He said plaintiff called on him at his garage on June 15, 1936, which was correct. He says plaintiff mentioned himself as from Chicago and stated he was a postal inspector and asked

him the number of his car, which at that time he could not remember. He says plaintiff pulled out a piece of paper with a number on it and asked him if that was it; that he (defendant) went to the 'phone and called the Elgin Police Department and inquired, then turned to plaintiff and said that was his number. Plaintiff then said, "Your car hit me in Chicago, on Washington and Karlov avenue," to which defendant replied, "There must be a mistake. I never hit anybody in my life". They then went to the office of Mr. Jenks, where plaintiff said defendant was a hit and run driver and told the same story to Mr. Jenks. Jenks asked plaintiff if he would sign a written statement, but plaintiff said he was advised not to do so. Defendant says plaintiff did not say that Collins had called on him, or that defendant was the man who struck him, nor did defendant say he was in the vicinity of the occurrence, or that he felt a bump, etc. Defendant further testified he did not employ an investigator prior to June 15, 1936. He employed Healy, Beverly & Funk as his attorneys about two weeks thereafter. Defendant said he heard plaintiff testify in October before Judge Graber, and that he was there asked if he was alone when he was struck and replied that he was. Clifford Haumiller, son of defendant, Mrs. Haumiller, the wife, and Howard, another son, all testified that defendant was at his home in Elgin when the occurrence in Chicago took place.

Margaret Colie, who says she saw the occurrence from the window of her front room, says that the injured party was alone. Nathan Kellenberger, an employee of defendant, testified that defendant was at his place of business during the day of February 4, 1936, and that at 7:30 in the evening he was in the garage giving instructions and dressed

him the number of his car, which at that time he could not remember. He says plaintiff pulled out a piece of paper with a number on it and asked him if that was it; that he (defendant) went to the phone and called the Wigan Police Department and inquired, then turned to plaintiff and said that was his number. Plaintiff then said, "That was my car in Chicago, an Indianapolis was taken away from me," defendant replied, "There must be a mistake. I never hit anybody in my life". They then went to the office of Mr. Jenkins, where plaintiff said defendant was a hit and run driver and told the same story to Mr. Jenkins. Jenkins asked plaintiff if he would sign a written statement, but plaintiff said he was advised not to do so. Defendant says plaintiff did not say that Collins had called on him, or that defendant was the man who struck him, nor did defendant say he was in the vicinity of the occurrence, or that he felt a bump, etc. Defendant further testified he did not employ an investigator prior to June 15, 1936. He employed Healy, Beverly & Funk as his attorneys about two weeks thereafter. Defendant said he heard plaintiff testify in October before Judge Graber, and that he was there asked if he was alone when he was struck and replied that he was. Clifford Hamilton, son of defendant, Mrs. Hamilton, the wife, and Howard, another son, all testified that defendant was at his home in Wigan when the occurrence in Chicago took place. Margaret Collie, who says she saw the occurrence from the window of her front room, says that the injured party was alone. Nathan Kellenberger, an employee of defendant, testified that defendant was at his place of business during the day of February 4, 1936, and that at 7:30 in the evening he was in the garage giving instructions and dressed

in his overalls. Jacob Knupp, who reached plaintiff while he was on the curb after the injury, also says plaintiff was alone, and further that he didn't see Marcus there the night of the occurrence. Carleton D. Myers, a beverage distributor, testified he saw defendant at defendant's place of business in Elgin at about 8:00 P.M. on the evening of February 4, 1936. Edward Newlander, a court reporter, testified that he took the testimony in the criminal case before Judge Graber, and says that plaintiff was asked if he was alone at the time of the occurrence and said that he was.

Plaintiff, when Collins testified that he had never seen him at the hospital, interjected the remark that he had not seen Collins either, and afterward testified in rebuttal that the Collins produced as a witness was not the man who called upon him at the hospital. Plaintiff offered in evidence the memorandum said to have been made by Marcus at the time and just after the occurrence of February 4 but it was excluded. Plaintiff also testified in rebuttal that on the trial of the criminal case before Judge Graber he had been advised by counsel not to disclose at that hearing the names of his witnesses. The report of the police officer Walsh, who interviewed plaintiff before making it, does not show the number of the car that hit plaintiff. A form asking that question was not filled in. Walsh says plaintiff told him he did not have the license number.

The cause was submitted to the jury, and as already stated there was a verdict for the defendant which the court afterward, upon motion of the plaintiff, set aside, and this appeal is from that order.

The trial judge gave two reasons for granting plaintiff's motion, and several other alleged reasons are argued in

in his overalls. Jacob Knapp, who remained plaintiff while he was on the curb after the injury, also says plaintiff was alone, and further that he didn't see Hanson there the night of the occurrence. Garfield D. Myers, a beverage distributor, testified he saw defendant at defendant's place of business in High at about 8:00 P.M. on the evening of February 4, 1936. Edward Newlander, a court reporter, testified that he took the testimony in the criminal case before Judge Graber, and says that plaintiff was asked if he was alone at the time of the occurrence and said that he was.

Plaintiff, when Collins testified that he had seen him at the hospital, interjected the remark that he had not seen Collins either, and afterward testified in rebuttal that the Collins produced as a witness was not the man who called upon him at the hospital. Plaintiff offered in evidence the memorandum said to have been made by Hanson at the time and just after the occurrence of February 4 but it was excluded. Plaintiff also testified in rebuttal that on the trial of the criminal case before Judge Graber he had been advised by counsel not to discuss at that hearing the name of his witnesses. The report of the police officer Walsh, who interviewed plaintiff before making it, does not show the number of the car that hit plaintiff. A form asking that question was not filled in. Walsh says plaintiff told him he did not have the license number.

The cause was submitted to the jury, and as already stated there was a verdict for the defendant which the court afterward, upon motion of the plaintiff, set aside, and this appeal is from that order.

The trial judge gave two reasons for granting plaintiff's motion, and several other alleged reasons are argued in

the briefs. Just before the cause was submitted to the jury, Mr. Funk of defendant's counsel, in the presence of the attorney for plaintiff but out of the hearing of the jury, disclosed that an anonymous person on the evening before had called him up on the telephone at his home and asked him if he would be willing to drive 28 miles to get a pointer on how to win the case. To a question by the attorney as to who he was, he replied that he was a juror, and said, "I want to see you win the case". Mr. Funk told the caller that it was highly improper for him to talk about the case; that he must not do so. The anonymous person said, "I only want to help you". Mr. Funk replied, "I am sorry. I do not want to offend you, but I cannot talk to you any further", and hung up. This call was traced and found to be from Melrose Park, number 9757, a pay station. One of the jurors resided in Melrose Park. When the matter was disclosed the trial judge said he was inclined to grant a mistrial. Neither of the parties, however, made a motion for it, and the attorney for plaintiff objected. He said he would not urge the matter as a reason for a new trial and, as a matter of fact, he has not done so. Mr. Funk for the defendant said he had no objection to going ahead with the trial if nothing was said to the jury at that time about the occurrence, and the trial judge said, "All right". After the verdict was returned the trial judge talked with each of the jurors about the matter and all of them disclaimed any knowledge of the anonymous call.

We agree with defendant's contention that the record discloses no adequate reason for giving a new trial on account of this occurrence and that to grant the motion for this reason in the absence of any objection or motion

the trial. Just before the case was admitted to the jury, Mr. Funk of defendant's counsel, in the presence of the attorney for plaintiff but out of the hearing of the jury, disclosed that an anonymous person on the evening before had called him up on the telephone at his home and asked him if he would be willing to drive 28 miles to get a pointer on how to win the case. To a question by the attorney as to who he was, he replied that he was a juror, and said, "I want to see you win the case". Mr. Funk told the caller that it was highly improper for him to talk about the case; that he must not do so. The anonymous person said, "I only want to help you". Mr. Funk replied, "I am sorry. I do not want to offend you, but I cannot talk to you any further", and hung up. This call was traced and found to be from Melrose Park, number 9357, a pay station. One of the jurors residing in Melrose Park when the matter was disclosed the trial judge said he was inclined to grant a mistrial. Neither of the parties, however, made a motion for it, and the attorney for plaintiff objected. He said he would not urge the matter as a reason for a new trial and, as a matter of fact, he has not done so. Mr. Funk for the defendant said he had no objection to going ahead with the trial if nothing was said to the jury at that time about the occurrence, and the trial judge said, "All right". After the verdict was returned the trial judge talked with each of the jurors about the matter and all of them disclaimed any knowledge of the anonymous call.

We agree with defendant's contention that the record discloses no adequate reason for giving a new trial on account of this occurrence and that to grant the motion for this reason in the absence of any objection or motion

for a mistrial by the parties would be to permit them to speculate upon the verdict.

A second reason for granting a new trial was given by the court and is urged by the plaintiff in that it is said that the attorney for defendant, under the guise of laying the foundation for an impeachment of plaintiff because of alleged inconsistent statements made at a criminal trial before Judge Graber, succeeded in placing before the jury an expression of Judge Graber, which was very prejudicial to plaintiff's interest. As already stated, there was a criminal proceeding tried before Judge Graber at which plaintiff testified. The crucial point in this civil case was, of course, that of the license number of the car which struck plaintiff. Plaintiff testified several times that he saw this license number and remembered it; that he saw the license number before he was struck by the car. On cross-examination, after stating he testified in the case before Judge Graber, attorney for defendant put to plaintiff this question: "Did the Court there state to you: 'Mr. Lyons, being hit with the car, you don't think the Court will give much credence that after he was hit and knocked eighteen feet he still had presence of mind and ability to read the automobile number proceeding at about forty miles an hour? I don't think that can be done.' Mr. Lyons: 'It was done under an arc light.' Did the Court say that, and did you make that reply?" An objection by plaintiff was overruled and defendant answered he did not make the statement or the reply that he saw the license number after he got hit. "Mr. Funk: 'That statement was not made to you, and you did not make that reply?' A: 'I didn't make the reply that I saw the license number after I got hit'."

for a mistrial by the parties would be to permit them to
speculate upon the verdict.

A second reason for granting a new trial was given
by the court and is urged by the plaintiff in that it is said
that the attorney for defendant, under the guise of laying
the foundation for an impeachment of plaintiff because of al-
leged inconsistent statements made at a criminal trial before
Judge Graber, succeeded in misleading before the jury an expres-
sion of Judge Graber, which was very prejudicial to plaintiff's
interest. As already stated, there was a criminal proceeding
tried before Judge Graber at which plaintiff testified. The
crucial point in this civil case was, of course, that of the
license number of the car which struck plaintiff. Plaintiff
testified several times that he saw this license number and
remembered it; that he saw the license number before he was
struck by the car. On cross-examination, after stating he
testified in the case before Judge Graber, attorney for
defendant put to plaintiff this question: "Did the Court
then state to you: 'Mr. Lyons, being hit with the car, you
don't think the Court will give much credence that after he
was hit and knocked eighteen feet he still had presence of
mind and ability to read the automobile number proceeding at
about forty miles an hour? I don't think that can be done.'
Mr. Lyons: 'It was done under an arc light.' Did the Court
say that, and did you make that reply?" An objection by
plaintiff was overruled and defendant answered he did not
make the statement or the reply that he saw the license number
after he got hit. "Mr. Lyons: 'That statement was not made to
you, and you did not make that reply.' A: 'I didn't make
the reply that I saw the license number after I got hit.'"

In giving his reasons for granting a new trial the court said: "I would like to see cases tried properly and get out of court. But on a new trial, several things can be handled better than they were in the other. For instance, a prejudicial statement was in the record, almost before objections could be made, as to what the trial Judge said in the criminal case. That really was not a question put to Lyons. It was a statement made to Lyons that really did not call for any answer. He said, 'How do you expect me to believe that?' And that alone crept into this record, and I feel that it should never have come in. It was not impeaching, in the usual way of impeachment, but it showed the jury of twelve men what a judge in the Criminal Court said to him; adding a great deal of weight. There was a judge testifying right there in the case. It was in. I forgot what Lyons said about it. He couldn't say a great deal about it. I feel confident that in the trial of the case again that is one statement that will not come into the case." The defendant cites People v. Gleitsmann, 361 Ill. 165, where the Supreme Court said:

"It is a fundamental right in any case to show that a witness has made statements out of court in conflict with his testimony on the stand."

There is, of course, no question of the right of any defendant to impeach the testimony of a plaintiff by showing other statements inconsistent with the testimony given by him. The trial judge who was in a position to best understand was manifestly of the opinion that this question was not asked for the purpose of laying the ground to impeach the witness but for the purpose of putting before the jury the statement of a judge of the Criminal Court which would be of much benefit to their client. The trial judge thought the state-

in giving his reasons for granting a new trial the court said: "I would like to see cases tried properly and get out of court. But on a new trial, several things can be handled better than they were in the other. For instance, a prejudicial statement was in the record, almost before objections could be made, as to what the trial judge said in the original case. That really was a question not to be asked. It was a statement made to those that really did not call for any answer. We said, 'How do you expect me to believe that?' and that alone would have told people, and I feel that it should never have come in. It was not prejudicial, in the usual way of prejudiciality, but it showed the jury of twelve men that a judge in the original case was so much taking a great deal of weight. There was a judge tampering right there in the case. It was not a tamper that I am sure about it. He couldn't say a great deal about it. I feel confident that in the trial of the case, which was in the original case will not come into the case. The defendant's name is James E. Williams, No. 111, 103, where the defense court said:

"It is a prejudicial error in any case to allow a witness to make statements not in evidence in conflict with his testimony on the stand."

There is, of course, no question of the right of any defendant to impeach the testimony of a plaintiff by showing that statements made by the plaintiff in the original case were in conflict with his testimony on the stand. The trial judge was in a position to have understood the conflict of the evidence and the evidence was not taken. The purpose of having the evidence taken was to show for the purpose of having the evidence taken the defendant of a judge of the original case which would be of some benefit to their client. The trial judge thought the state-

ment was prejudicial to the plaintiff and we agree. It was error to admit it. The plaintiff has argued at length that the verdict constituted a miscarriage of justice, and that it cannot be sustained on general principles. On the other hand, defendant contends that substantial justice has been attained by the verdict of the jury and that no other verdict could properly be returned in the case. It is not necessary for us to weigh the evidence upon an appeal of this character. We have carefully gone over it and the facts are recited in the opinion. The case was unusual; unusual in its facts and circumstances and unusual in the contradictory evidence given by the witnesses for the respective parties. The trial judge expressed the opinion that there was perjury in the case of a kind and character worthy of being called to the attention of the officers of the law. With this we agree. He saw and heard the witnesses. He was of the opinion that a new trial should be granted, and we are not able to say that his order for another trial was an abuse of discretion.

Complaint is made that a number of instructions given at defendant's request should have been refused. While in some respects these may be subject to criticism, we would not be disposed in a case where justice has been done to reverse on account of anyone of them. In appeals of this kind Appellate tribunals reverse with reluctance. (Gavin v. Slater, 278 Ill. App. 308; Wagner v. Chicago Motor Coach Co., 304 Ill. App. 402; Foss v. Halsey, Stuart Co., Inc., 308 Ill. App. 189.) The order will be affirmed.

AFFIRMED.

O'Connor and McSurely, JJ., concur.

were not presented to the plaintiff and he agreed. It was
 error to admit it. The plaintiff has agreed to testify that
 the verdict was a result of a conspiracy of justice, and that it
 cannot be sustained on general principles. In the other hand,
 defendant contends that substantial justice has been obtained
 by the verdict of the jury and that no other verdict could
 properly be returned in the case. It is not necessary for me
 to weigh the evidence upon an appeal of this character. We
 have carefully gone over it and the facts are fixed in the
 opinion. The case was unusual; unusual in its facts and cir-
 cumstances and unusual in the contradictory evidence given by
 the witnesses for the respective parties. The total belief
 expressed the opinion that there was perjury in the case of a
 high and honorable worthy of being called to the attention of
 the officers of the law. With this we agree. We now and
 heard the witness. He was of the opinion that a new trial
 should be granted, and we are not able to say that his order
 was manifestly wrong and an abuse of discretion.

Concluded to order that a writ of habeas corpus
 issue at defendant's request should have been returned. While
 in some respects there may be subject to criticism, we think
 not be required by a more exact justice has been done in
 return an account of justice of law. In appeal of this kind
 appellate tribunals review with reluctance. People v. Lister
100 Ill. 403; 200 Ill. 403; 200 Ill. 403; 200 Ill. 403.
100 Ill. 403; 200 Ill. 403; 200 Ill. 403; 200 Ill. 403.
 The order will be affirmed.

REVEREND

40676

HARRY J. MYERSON and JACOB E.
REPLOGLE,
Appellees,

vs.

GLENN D. NORTON; SECURITY FIRST
NATIONAL BANK OF LOS ANGELES,
AS GUARDIAN OF ORABELLE R.
NORTON, Incompetent,
Defendants-Appellants,

G. W. RODWAY,
Defendant-Appellant
(on separate appeal),

L. J. BARTLETT, INC., a corpo-
ration, et al.,
Defendants-Appellees.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

302 I.A. 176

MR. JUSTICE MCSURELY DELIVERED THE OPINION OF THE COURT.

The principal question involved in this case is the allowance to Harry J. Myerson of compensation for his legal services as a liquidator of the assets of L. J. Bartlett, Inc., a Delaware corporation.

This corporation was engaged in the mail order business in Chicago; in 1931 the business was in failing circumstances and the stockholders were desirous of liquidating the business and discontinuing the corporation; for this purpose a contract was entered into between the corporation and the owners and holders of the capital stock and L. J. Bartlett, who was the president, providing for this liquidation to be carried on under the direction and supervision of a committee consisting of Harry J. Myerson, Jacob E. Replogle, Joseph Fisher and Elbridge W. Rice; this contract provided for the payment of costs and expenses of liquidation, including attorney's fees to Myerson of \$1500 for all services which had been rendered up to the time of the making of the contract, "with the further provision that he should receive reasonable compensation for legal services to be rendered to the Liquidating Committee in the liquidating of the business."

JOHN J. HENNESSY and others,
 DEFENDERS.

vs.

U. S. DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK.

AS GUARANTY OF HENNESSY & CO.,

DEFENDERS.

U. S. DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK.

U. S. DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK.

U. S. DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK.

U. S. DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK.

U. S. DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK.

U. S. DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK.

THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

The principal question involved in this case is the

allowance to Harry J. Hyson of compensation for his legal services

as a liquidator of the assets of J. J. Hennessy, Inc., a defendant

corporation.

This corporation was engaged in the mail order business in

Chicago; in 1931 the business was in failing circumstances and the

stockholders were desirous of liquidating the business and dis-

continuing the corporation; for this purpose a contract was entered

into between the corporation and the assets and interest of the

capital stock and J. J. Hennessy, who was the president, providing

for this liquidation to be carried on under the direction and super-

vision of a committee consisting of Harry J. Hyson, Jacob E.

Knapp, Joseph Fisher and Bridge W. Rice; this contract provided

for the payment of costs and expenses of liquidation, including

attorney's fees to Hyson of \$1500 for all services which had been

rendered up to the time of the making of the contract, and the

further provision that he should receive reasonable compensation

for legal services to be rendered in the liquidating committee in

THE LIQUIDATING OF THE ASSETS.

Myerson from that time on supervised the liquidation and no objections were made to this. Certain differences arose between Myerson and Replogle on the one hand, and Rice and Fisher, the other two liquidators; differences also arose with Mr. Bartlett, the firm president; thereupon Myerson and Replogle filed their complaint in chancery in which these facts were set forth in detail, also an itemized statement of the receipts and disbursements and an itemized statement of the services rendered by Myerson on behalf of the liquidating committee. The complaint asked for instructions as to how distribution should be made of certain assets; that the resignation of the four liquidators be accepted and their several accounts approved; answers and counterclaims were filed by Glenn D. Norton, Orabelle R. Norton and G. W. Rodway, stockholders; the cause was referred to a master who took testimony and reported his conclusions; he found that all of the material allegations of the complaint had been proven, that plaintiffs were entitled to the relief prayed, that the counterclaims filed should be dismissed; objections were filed and overruled and exceptions were heard by the chancellor, who entered a decree approving the master's report in all respects, except as to the master's recommendation that a Prudential Life Insurance Company policy upon the life of Glenn D. Norton for \$25,000, payable to Bartlett, Inc., and constituting one of its assets, be sold; Glenn D. Norton and the Security First National Bank of Los Angeles, guardian of Orabelle R. Norton, incompetent, appealed, and, also, notice of separate appeal by G. W. Rodway was filed. These counterclaims and separate appeals will be commented upon later in this opinion.

The master found that after the execution of the liquidation agreement of June 30, 1931, the liquidators proceeded to collect all of the outstanding assets of Bartlett, Inc., and to pay certain of its debts; that Myerson, as liquidator, settled many of the claims against the corporation; that he received approximately

Myerson from that time on supervised the liquidation and
no objections were made to this. Certain differences arose between
Myerson and Repley on the one hand, and Rice and Fisher, the other
two liquidators; differences also arose with Mr. Bartlett, the firm
president; thereupon Myerson and Repley filed their complaint in
chancery in which these facts were set forth in detail, also an
itemized statement of the receipts and disbursements and an itemized
statement of the services rendered by Myerson on behalf of the
liquidating committee. The complaint asked for instructions as to
how distribution should be made of certain assets; that the resignation
of the four liquidators be accepted and their several accounts ap-
proved; answers and counterclaims were filed by Glenn B. Norton,
Orabelle M. Norton and G. W. Rodway, stockholders; the cause was
referred to a master who took testimony and reported his conclusions;
he found that all of the material allegations of the complaint had
been proven, that plaintiffs were entitled to the relief prayed,
that the counterclaims filed should be dismissed; objections were
filed and overruled and exceptions were heard by the chancellor, who
entered a decree approving the master's report in all respects, ex-
cept as to the master's recommendation that a dividend be
declared upon the life of Glenn B. Norton for
\$25,000, payable to Bartlett, Inc., and constituting one of its
assets, be sold; Glenn B. Norton and the Security Trust National Bank
of Los Angeles, guardian of Orabelle M. Norton, incompetent, ap-
pealed, and, also, notice of separate appeal by G. W. Rodway was
filed. These counterclaims and separate appeals will be commented
upon later in this opinion.

The master found that after the execution of the liquidation
agreement of June 30, 1931, the liquidators proceeded to
collect all of the outstanding assets of Bartlett, Inc., and to pay
certain of its debts; that Myerson, as liquidator, settled many of
the claims against the corporation; that he received approximately

\$41,000 and disbursed about \$37,500, upwards of \$20,000 being paid to creditors of the corporation; that Myerson from June 30, 1931, the date of the liquidating contract, up to and including June 20, 1932, managed the affairs of the corporation as liquidator, and thereafter, until the filing of the instant complaint on July 19, 1937, continued to supervise the affairs and the liquidation of the corporation.

The master noted that the objecting stockholders say there is no provision that the liquidators should act other than as a unit, and there is no provision that any single member could act independently of the others, and that there is no provision in the contract that Myerson should receive compensation, except reasonable compensation for legal services rendered to the liquidating committee, and that Myerson did not perform purely legal services in the liquidating of the corporation.

The master found that Myerson was a licensed attorney practicing at the Chicago Bar for more than 30 years; that the active management and complete control of the liquidation was under his sole supervision, the three other liquidators not taking any part in these services; the master found that a fair and reasonable sum to be allowed Myerson as compensation for such services was \$5500. The chancellor approved this report. When the findings of the master are approved by the chancellor they will not be disturbed unless manifestly against the weight of the evidence. Pasedach v. Auw, 364 Ill. 491; Stasch v. Stasch, 355 Ill. 581; Bednarczyk v. Kudla, No. 40646, opinion filed in this court October 23, 1939.

The appellants charge that Myerson was a trustee ex maleficio; that he obtained possession of the assets of the corporation without any authority, but the record shows that it was by the agreement and acquiescence of the other liquidators that Myerson assumed the active duties of attempting to preserve and save the

1937, continued to supervise the affairs and the liquidation of the corporation, until the filing of the instant complaint on July 18, 1938, managed the affairs of the corporation as liquidator, and the date of the liquidating account, up to and including June 30, 1937, to creditors of the corporation; that Myerson from June 30, 1937, \$41,000 and disbursed about \$37,500, upwards of \$30,000 being paid

The master noted that the objecting stockholders say there is no provision that the liquidators should act other than as a unit, and there is no provision that any single member could act independently of the others, and that there is no provision in the contract that Myerson should receive compensation, except reasonable compensation for legal services rendered to the liquidating committee, and that Myerson did not perform purely legal services in the liquidating of the corporation.

The master found that Myerson was a licensed attorney practicing at the Chicago Bar for more than 30 years; that the active management and complete control of the liquidation was under his sole supervision, the three other liquidators not taking any part in these services; the master found that a fair and reasonable sum to be allowed Myerson as compensation for such services was \$3800. The chancellor approved this report. When the findings of the master are approved by the chancellor they will not be disturbed unless manifestly against the weight of the evidence. Paraback v. Am. Ice Co. Inc., 251 Ill. App. 2d 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000

The appellants charge that Myerson was a trustee or fiduciary; that he obtained possession of the assets of the corporation without any authority, and the master found that he was not

assets of the corporation. The record shows that he was very active and efficient in the performance of the duties required. The master in chancery, who heard and saw all the witnesses and examined the intricate accounts and vouchers, approved of the services rendered by Myerson, as did the chancellor. We find nothing that would justify our disagreeing with the conclusion reached by the master and the chancellor with reference to the compensation of Myerson for these services.

As we have indicated above, there was found among the assets of the corporation a Prudential Life Insurance Company policy, issued December 8, 1928, upon the life of Glenn D. Norton, which provided for the payment to Bartlett, Inc., of \$25,000 upon his death and the sum of \$250 per month during the period of any disability. It appears that a receiver of the company has been collecting \$250 a month for several years past, during which period Glenn D. Norton has been disabled. The chancellor did not approve of the recommendation of the master that this policy should be sold, but ordered it held by the court, with any other unliquidated assets, until the further order and direction of the court. Complaint is made of this by the Nortons. This order of the chancellor was interlocutory and not subject to review on this appeal. Rosenthal v. Board of Education, 239 Ill. 29, 36; Rettig v. Zander, 364 Ill. 112, 115-116.

G. W. Rodway prosecutes a separate appeal from an order denying his motion to vacate a default judgment said to have been entered against him on July 3, 1936. The brief filed on his behalf gives very little information as to the character of this judgment, although we assume that he was made a party defendant as one of the stockholders of Bartlett, Inc., and served with notice of the filing of the complaint by mail, sent to him at his residence in St. Louis, Mo. His complaint seems to be that he was lulled into a feeling of security and led to forego taking steps to defend the action, and

assets of the corporation. The record shows that he was very active and efficient in the performance of the duties assigned. The master in chancery, who heard and saw all the witnesses and examined the intricate accounts and vouchers, approved of the services rendered by Myerson, as did the chancellor. We find nothing that would justify our dissenting with the decision reached by the master and the chancellor with reference to the compensation of Myerson for these services.

As we have indicated above, there was found among the assets of the corporation a substantial life insurance company policy, issued December 8, 1928, upon the life of Glenn D. Norton, which provided for the payment to Bartlett, Inc., of \$25,000 upon his death and the sum of \$250 per month during the period of any disability. It appears that a receiver of the company has been collecting \$250 a month for several years past, having since paying Glenn D. Norton has been disabled. The chancellor did not approve of the recommendation of the master that this policy should be sold, but ordered it held by the court, with any other undistributed assets, until the further order and direction of the court. Complaint is made of this by the Norton. This order of the chancellor was interlocutory and not subject to review on this appeal.

Hosenthal v. Board of Education, 232 Ill. 32, 36; Battle v. Kankakee, 264 Ill. 112, 115-116.

G. W. Hedberg procured a separate appeal from an order denying his motion to vacate a default judgment said to have been entered against him on July 8, 1936. The brief filed on his behalf gives very little information as to the character of this judgment, although we assume that he was made a party defendant as one of the stockholders of Bartlett, Inc., and served with notice of the filing of the complaint to sell, said to be an old business in St. Louis, Mo. His complaint seems to be that he was lulled into a feeling of security and led to forego taking steps to defend the action, and

as a result he was defaulted for failure to appear. No record has been filed in this court giving all the facts and evidence which was submitted to the chancellor upon his motion to vacate the default judgment. The chancellor, in denying the motion to vacate, found that Rodway was furnished about July 25, 1935, with a copy of the complaint and was duly served by publication notice as required by statute and was defaulted July 3, 1936; that he has not shown due diligence nor any merit in his petition to vacate the default. Under these circumstances we will not disturb the order of the court.

Upon the entire record we find no sufficient reason to disagree with the decree of the chancellor which is properly before us on appeal, and it is therefore affirmed.

AFFIRMED.

Matchett, P. J., and O'Connor, J. concur.

as a result he was detained for failure to appear. No record has been filed in this court giving all the facts and evidence which was submitted to the chancellor upon his motion to vacate the default judgment. The chancellor, in denying the motion to vacate, found that Norway was furnished about July 28, 1935, with a copy of the complaint and was duly served by publication notice as required by statute and was defaulted July 2, 1936; that he has not shown due diligence nor any merit in his petition to vacate the default. Under these circumstances we will not disturb the order of the court.

Upon the entire record we find no sufficient reason to disagree with the decree of the chancellor which is properly before us on appeal, and it is therefore affirmed.

ATTORNEYS

WILLIAM J. J. and O'CONNOR, J. CONNOR.

WILLIAM LESLIE THOMA, as Executor
of the Last Will and Testament of
Ida C. Dutton, Deceased,

Plaintiff,

vs.

ROBERT H. EBERLE, PIOTR MONDRO
and MARY MONDRO,

Defendants.

WILLIAM LESLIE THOMA, Individually,
(Substituted Plaintiff),

Appellant,

vs.

ROBERT H. EBERLE, PIOTR MONDRO,
MARY MONDRO, IDA RINGLER and MAMIE
THOMA,

Defendants.

ROBERT H. EBERLE,

Appellee.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

302 I.A. 177

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

This suit involves the ownership of a mortgage note for \$4000. Defendant Robert H. Eberle claims to own the note by gift from his deceased cousin, Louisa J. Eberle. The suit was originally brought by William Leslie Thoma as executor of the last will and testament of Ida C. Dutton, deceased; that suit was subsequently discontinued and the cause proceeded with William Leslie Thoma, individually, as plaintiff; after taking much evidence the master to whom the cause was referred found that defendant was the owner of the note; objections and exceptions were overruled, the court decreed as recommended and the complaint was ordered dismissed for want of equity. Plaintiff appeals.

The complaint was brought upon the theory that the note belonged to Ida C. Dutton, now deceased, a cousin of defendant; defendant asserts that the evidence fails to show this but does show that it belonged to her sister, Louisa J. Eberle, who gave

These two foreign notes
of your society.

3021.A.137

WILLIAM LESLIE THOMAS, as executor
of the last will and testament of
JAMES U. WHEELER, Deceased,
Plaintiff,
vs.
ROBERT H. WHEELER, Executor
and JOHN WHEELER,
Defendants,
JAMES U. WHEELER, Deceased,
(Indorsed Plaintiff),
vs.
JAMES U. WHEELER, Executor,
and JOHN WHEELER,
Defendants,
vs.
WILLIAM LESLIE THOMAS, as executor
of the last will and testament of
JAMES U. WHEELER, Deceased,
Plaintiff,
vs.
ROBERT H. WHEELER, Executor
and JOHN WHEELER,
Defendants,
vs.
WILLIAM LESLIE THOMAS, as executor
of the last will and testament of
JAMES U. WHEELER, Deceased,
Plaintiff,
vs.
ROBERT H. WHEELER, Executor
and JOHN WHEELER,
Defendants.

1. That the said Robert H. Wheeler is the son of the said James U. Wheeler.

This suit involves the ownership of a mortgage note for \$4000. Defendant Robert H. Wheeler claims to own the note by gift from his deceased cousin, James U. Wheeler. The suit was originally brought by William Leslie Thomas as executor of the last will and testament of the said James U. Wheeler, deceased; that suit was subsequently discontinued and the cause proceeded with William Leslie Thomas, individually, as plaintiff; after taking such evidence the matter is when the same was returned James U. Wheeler was the owner of the note; objections and exceptions were overruled, the court so ordered as recommended and the verdict was entered directed for want of equity. Plaintiff moves.

The complaint was returned with the finding that the note belonged to the said James U. Wheeler, deceased, as a matter of substance; defendant answers that the evidence fails to show this but does show that it belonged to his father, James U. Wheeler, who gave

it to him as compensation for legal services.

Defendant Robert Eberle is a lawyer practicing in Chicago. Ida C. Dutton resided in California until her death in September, 1932; her sister, Louisa J. Eberle, also resided in California, where she died in November, 1930. These women were first cousins of defendant.

For many years defendant had acted as their attorney and advisor; he advised them as to their property interests and securities and drew various wills for them, respectively; they were on very friendly terms and visited one another at their respective homes in Chicago and in California. Defendant never rendered any bills for services to his cousins, although it appears that at one time in one of her letters Ida said, "do not forget to enclose what I. O. U. that I may remit." By her will Ida Dutton left a legacy of \$1000 to defendant.

Plaintiff charges that defendant was entrusted by Ida Dutton with certain moneys to be invested for her; that defendant invested the moneys in the mortgage in question and acted merely as her attorney and agent. The master found that certain moneys were given to Eberle by Louisa Eberle for investment and that she gave defendant the mortgage investment for services rendered.

The evidence before the master consists largely of the testimony of the defendant and letters between the various parties. Plaintiff objects to the testimony of defendant on the ground that a fiduciary relationship existed between defendant and Ida C. Dutton; that the burden was on defendant to show the fairness and justice of the transaction between Ida Dutton and the defendant, to which defendant replies that since the mortgage was the property solely of Louisa J. Eberle, the question of the relationship between Ida Dutton and the defendant is not involved.

Defendant testified he never collected any moneys for Ida

to him as compensation for legal services.

Defendant Robert Morris is a lawyer practicing in Chicago.

Ida C. Button resided in California until her death in September,

1932; her sister, Louise J. Morris, also resided in California, where

she died in November, 1933. These women were first cousins of de-

fendant.

For many years defendant and sister Louise Morris lived in

Chicago; he worked there as a bank security guard and sister

Louise was a stenographer. They were on very

friendly terms and visited one another at their respective homes in

Chicago and in California. Defendant never rendered any bill for

services to his cousins, although it appears that at one time in one

of her letters Ida said, "do not forget to enclose when I. O. U.

that I may remit." By her will Ida Button left a legacy of \$1000

to defendant.

Plaintiff alleges that defendant was entrusted by Ida

Button with certain money to be invested for her; that defendant

invested the money in the mortgage in question and acted merely as

an attorney and agent. The master found that certain money were

given to Morris by Louise Morris for investment and that she gave

defendant the mortgage interest for services rendered.

The witness before the master considers largely of the

testimony of the defendant and letters between the various parties.

Plaintiff objects to the testimony of defendant on the ground that a

fiduciary relationship existed between defendant and Ida C. Button;

that the burden was on defendant to show the fairness and justice of

the transaction between Ida Button and the defendant, to which defend-

ant replied that since the mortgage was the property solely of Louise

J. Morris, the question of the relationship between Ida Button and

the defendant is not material.

Defendant testified he never collected any money for Ida

C. Dutton; that with the money belonging to Louisa Eberle he bought the note in question in 1922 and subsequently collected the interest on it every six months and remitted this to Louisa until her death in 1930. This is corroborated by the entries in a memorandum book in the handwriting of Louisa Eberle. The estate of Louisa was never probated, and after her death defendant remitted the interest when collected to Ida Dutton so long as she lived,

Defendant testified that he still has the note in his possession. After the death of Ida Dutton in September, 1932, many letters passed between the attorneys for her estate and defendant, William Thoma, the present sole plaintiff, is a second cousin of Ida C. Dutton.

The master found that after the investment in the mortgage note in question Louisa Eberle gave it to defendant, who then agreed with her to pay to her during her lifetime the income from the note, and further agreed that in the event of Louisa's death prior to that of Ida he would pay the income from the note to Ida during her lifetime; that defendant observed this agreement and transmitted the interest to Louisa Eberle until her death and subsequently to Ida Dutton until her death in September, 1932. The master found that the principal and interest notes and trust deed were at no time the property of Ida C. Dutton, deceased, and that William Thoma is not the owner of them and is not entitled to their possession.

We see no reason to disagree with the master's conclusion. It is supported by many small items. There was nothing directly in conflict with defendant's testimony. There were a few statements by him which might afford some basis for argument, but the weight of the evidence is in his favor. To narrate it in any satisfactory manner would unduly lengthen this opinion.

Eberle was a competent witness. The suit was originally

C. Weston; that the money belonging to Louise Wherle was
bought the note in question in 1928 and subsequently collected the
interest on it every six months and remitted this to Louise until
her death in 1930. This is corroborated by the entries in a memo-
randum book in the handwriting of Louise Wherle. The estate of
Louise was never probated, and after her death defendant remitted
the interest when collected to the estate as was shown.
Defendant testified that he will see the note in his
possession. After the death of the witness in September, 1930,
defendant passed to him the note and the interest on it and the
note, William Brown, defendant's father-in-law, is a resident
of the town of Ida C. Weston.

The master found that after the investment in the mortgage
note in question Louise Wherle gave it to defendant, who then
acted with her in regard to her having her interest in the income from
the note, and further stated that in the year of Louise's death
prior to that of her father he would pay the income from the note to the
living her interest; that defendant observed this agreement and
transferred the interest to Louise Wherle until her death and sub-
sequently to the estate until her death in September, 1930. The
master found that the principal and interest notes and trust deed
were at no time the property of Ida C. Weston, deceased, and that
William Brown is not the owner of them and is not entitled to
their possession.

We are so advised by the master's findings and conclusions.
It is suggested by the master that the note should be
in default of the defendant's testimony. There was a lot of testimony
by the witness that after her death the income, not the note
of the witness is in the estate. It appears to be not satisfactory
evidence would make defendant's testimony.
There was a suggestion of the master's findings.

instituted by William Leslie Thoma as executor of the last will and testament of Ida C. Dutton, deceased; it was afterward discontinued as such, and William Leslie Thoma, individually, together with Mamie Thoma, his mother, and Ida Ringler, defendant's sister, were substituted as parties plaintiff; Mamie Thoma and Ida Ringler declined to be joined as parties plaintiff and were made parties defendant and served with summons; Mamie Thoma was defaulted for want of an answer, Ida Ringler filed her answer and the cause proceeded to final hearing with William Leslie Thoma, individually, as the sole plaintiff.

The report of the master finding that Robert Eberle was the owner of the note, and the approval by the trial court, will not be disturbed unless manifestly against the weight of the evidence. Bednarczyk v. Kudla et al., opinion No. 40646, filed in this court October 23, 1939; Pasedach v. Auw. 364 Ill. 491; Stasch v. Stasch, 355 Ill. 581. We are rather inclined to the view that plaintiff is endeavoring to recover, not on the strength of his own title, but on the alleged weakness of defendant's title. We would not be justified in disagreeing with the master and the decree of the trial Judge.

The decree is therefore affirmed.

AFFIRMED.

Matchett, P. J., and O'Connor, J., concur.

MINNIE DAVIS and SAMUEL E.
WEINSHENKER,

Appellants,

vs.

A. K. SELZ, BURT C. HARDENBROOK,
WILLIAM T. BRUCKNER, DAVID B.
STERN, Individually and as Members
of a Bondholders' Committee under
a Deposit Agreement dated July 20,
1931, A. G. BECKER & CO., a corpo-
ration, and CHARLES H. ALBERS,
Receiver of the Foreman Trust and
Savings Bank,

Appellees.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

302 I.A. 178

MR. JUSTICE MCSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiffs appeal from an order sustaining the motions of defendants to dismiss their complaint. The motions were supported by affidavits and court records.

The complaint sought to have set aside a decree of the Superior court entered July 12, 1933, in the case of Brown et al v. Foreman et al., No. 550473, and to reinstate a former decree in the same case entered January 17, 1933, which had been vacated by the consent of all the parties. The case involved reorganization proceedings and the decree of January 17th ordered an accounting by the Foreman Trust and Savings Bank, as trustee, the removal of this trustee and also an accounting from A. G. Becker & Co. The decree of July 12, 1933, vacated and set aside this decree but gave much of the relief given by the prior decree.

In August, 1927, A. G. Becker & Co., investment bankers, entered into a trust agreement with the Foreman Trust and Savings Bank as trustee, whereby Becker & Company deposited \$6,000,000 in cash with the bank as trustee to be used by it in the purchase of first mortgage obligations on real estate to be held for the benefit and security of holders of first mortgage participation certificates to be issued by the trustee and sold to the public.

By the terms of the agreement the Becker company was obligated to reimburse the trustee for all of the costs and expenses in connection with the administration of the trust. The company was also to approve the securities to be purchased by the trustee.

Plaintiff Minnie Davis purchased 12000 of these beneficial certificates, and plaintiff Weinshenker purchased 10,000 of them.

July, 1931, a certificate holders' committee (sometimes called a bondholders' protective committee) was organized, and the plaintiffs in this case deposited their certificates with this committee. In January, 1932, there was a default in the payment of interest on the participation certificates; suit was brought in the Superior court of Cook county by certain certificate holders, entitled Brown et al v. Foreman et al., case No. 550473, seeking the removal of the Foreman bank as trustee and to hold the trustee and Becker & Company liable for misfeasance and malfeasance in that Becker & Company had failed to pay the taxes upon the properties which it had agreed to pay and that the bondholders' committee, ostensibly organized for the purpose of protecting the investors, was in fact organized by Becker & Company to protect its own interests.

The parties to that suit, both plaintiffs and defendants, represented over 96 1/2 per cent of the total outstanding certificates.

January 17, 1933, the Superior court entered a decree in that cause removing the Foreman bank as trustee and ordering an accounting by the trustee and Becker & Company; all of the defendants appealed from that decree to this court; while the appeals were pending, negotiations for settlement were in progress, as a result of which - all of the parties consenting, all appeals were dismissed, the decree of January 17, 1933, vacated and a decree entered by the Superior court on July 12, 1933, concluding all matters in con-

By the terms of the agreement the trustee company was obligated to reimburse the trustee for all of the costs and expenses in connection with the administration of the trust. The company was also to approve the accounts to be purchased by the trustee. Plaintiff William Davis purchased \$3000 of these bonds. Plaintiff Weisbach purchased 10,000 of them.

July, 1923, a certificate of incorporation was filed in the state of New York, entitled "Becker & Company, Inc." and the plaintiff is this now organized under the laws of the state of New York. This corporation, in January, 1923, began to pay the interest on the participation certificates; but was unable to pay the principal of the certificates. In the spring of 1923, the corporation was reorganized, entitled Becker & Company, Inc. v. Foreman et al., case No. 220473, and the removal of the Foreman bank as trustee and to hold the trustee and Becker & Company liable for misfeasance and negligence in that Becker & Company had failed to pay the taxes upon the properties which it had agreed to pay and that the bondholders' committee, ostensibly organized for the purpose of protecting the investors, was in fact organized by Becker & Company to protect its own interests.

The parties to that suit, both plaintiffs and defendants, represented over 90 per cent of the total outstanding certificates. In January 17, 1923, the Superior court entered a decree in that case removing the Foreman bank as trustee and ordering an accounting by the trustee and Becker & Company; all the parties appeared from that decree to this court; while the appeals were pending, negotiations for settlement were in progress, as a result of which - all of the parties consenting, all appeals were dismissed. The decree of January 17, 1923, vacated and a decree entered by the Superior court on July 12, 1923, confirming all matters in con-

troversy.

That decree approved a settlement of all the liabilities claimed by the plaintiffs, discharged the original trustee bank and Becker & Company from further obligations under the indenture of trust between it and the Foreman bank and confirmed the appointment of Frank C. Rathje as successor trustee, with all the rights vested in the original trustee.

May, 1935, Rathje, successor trustee, upon request of the bondholders' committee, filed a petition in the District Court of the United States for reorganization of the trust under section 77B of the Bankruptcy act; in this court that action was fully approved when we (Third Division) reversed an order of the Superior court discharging the successor trustee for filing the reorganization proceedings. Rathje v. Serb, 287 Ill. App. 142.

After a hearing before a special master, appointed to examine into the reorganization proceedings, an order was entered in the United States District Court approving the petition for reorganization as filed in good faith.

A certificate holder, Vernon Tetzke, represented by Meyer Abrams, the same counsel as appears here for plaintiffs, prayed two appeals; the validity of the District court order was attacked and both appeals were dismissed by the Circuit court of Appeals; Tetzke then appealed to the Supreme Court of the United States for a writ of certiorari, which petition was denied, as was also a petition for rehearing.

A plan of reorganization was filed in the Federal court, referred to a special master, who recommended confirmation; there objections and exceptions to the master's report were filed by Mr. Abrams; these objections and exceptions attacking the validity of the decree entered July 12, 1935 were overruled and the report of the master, recommending the plan of reorganization, was affirmed; final decree was entered in the Federal court on May 9,

However,

That George approved a settlement of all the liabilities claimed by the plaintiff, discharged the original estate and Becker & Company from further obligations under the indenture of 1902 between it and the Federal Bank and confirmed the appointment of Frank C. Smith as successor trustee, with all the rights vested in the original trustee.

On July 1, 1902, the court, upon motion of the plaintiff's committee, filed a petition in the District Court of the United States for the District of Columbia for the appointment of a receiver of the assets of the plaintiff, and in this court that action was fully approved when the (Third Division) reversed an order of the Superior Court dissolving the successor trustee for filing the reorganization plan. Smith v. Smith, 207 Ill. App. 102.

After a hearing before a special master, appointed in 1902, the reorganization plan was approved, and the receiver was appointed in the United States District Court for the District of Columbia, and the plan was filed in said court.

A certificate holder, Vernon Smith, represented by Henry Adams, the same counsel as appears here for plaintiff, prayed for the appointment of a receiver of the assets of the plaintiff, and the court was divided by the District Court of the United States for the District of Columbia, and the plan was filed in said court.

A plan of reorganization was filed in the Federal court, referred to a special master, and recommended confirmation; there objections and exceptions to the master's report were filed by the plaintiff; these objections and exceptions attacking the validity of the plan were entered July 12, 1902, were overruled and the report of the master, recommending the plan of reorganization, was affirmed; final decree was entered in the Federal court on May 2,

1936, overruling all exceptions in connection with the consummation of the reorganization plan and the discharge of the debtor.

Tetzke, again represented by Mr. Abrams, filed an appeal from this final decree, principally attacking the decree of July 12, 1933; after a full hearing the Circuit Court of Appeals sustained the motion to dismiss that appeal, expressing the opinion that there was no error upon the merits of the reorganization plan. Tetzke again petitioned for a writ of certiorari to the Supreme Court of the United States, which was denied.

Again Tetzke, acting through Mr. Abrams, on July 10, 1935, which was just two days prior to the expiration of the two year statute of limitations, sued out a writ of error from the Appellate Court of Illinois seeking to reverse the July 12, 1933 decree, which was dismissed on motion of Rathje, successor trustee, and the committee.

July 12, 1935, just two years from the date of the decree of July 12, 1933, another party, represented by counsel associated with Mr. Abrams, filed a bill of review in the Superior court in which all of the prior proceedings were recited, and again sought an order declaring the decree of July 12, 1933, to be null and void and the decree of January 17, 1933, in full force and effect. January 19, 1937, this bill was dismissed.

The present complaint seeks the same action by the court as was sought in these prior proceedings.

Defendants assert that this complaint is a bill of review and is barred by the statute of limitations applicable to such proceedings. The decree which is attacked was entered July 12, 1933. The period of limitations for filing a bill of review is the same as allowed for perfecting an appeal or to sue out a writ of error. Knaus v. Chicago Title & Trust Co., 365 Ill. 588. At the time the decree which is attacked was entered this period of limitations was two years. (Smith-Hurd's Ill. Rev. Stats. 1935, chap. 110, sec. 117.)

1936, overruling all exceptions in connection with the consummation of the reorganization plan and the discharge of the debtor. Petzke, again represented by Mr. Abrams, filed an appeal from this final decree, principally attacking the decree of July 12, 1935; after a full hearing the Circuit Court of Appeals sustained the motion to dismiss that appeal, expressing the opinion that there was no error upon the merits of the reorganization plan. Petzke again petitioned for a writ of certiorari to the Supreme Court of the United States, which was denied.

Again Petzke, acting through Mr. Abrams, on July 10, 1936, which was just two days prior to the expiration of the two year statute of limitations, sued out a writ of error from the Appellate Court of Illinois seeking to reverse the July 12, 1935 decree, which was dissolved on motion of Petzke, without prejudice, and the committee.

July 12, 1935, just two years from the date of the decree of July 12, 1933, another party, represented by counsel associated with Mr. Abrams, filed a bill of review in the Superior Court in which all of the prior proceedings were recited, and again sought an order declaring the decree of July 12, 1935, to be null and void and the decree of January 10, 1933, to still remain and stand.

January 12, 1937, this bill was dismissed.

The present complaint states no new action of the court as was sought in these prior proceedings.

Defendants assert that this complaint is a bill of review and is barred by the statute of limitations applicable to such proceedings. The decree which is attached was entered July 12, 1935. The period of limitations for filing a bill of review is the same as allowed for perfecting an appeal or to sue out a writ of error. Ill. Rev. Stat. Ann. 1935, c. 110, sec. 117. At the time the decree which is attached was entered this period of limitations was

The complaint before us was not filed until September 6, 1938, more than five years after the entry of the decree of July 12, 1933, hence it is barred by the statute of limitations.

Plaintiffs assert, through an affidavit filed by Mr. Abrams, that the object of this complaint is not to review the decree of July 12, 1933, but to enforce the decree of January 17, 1933, which, it is claimed, is still in full force by reason of the alleged nullity of the decree of July 12, 1933. In determining whether any bill is a bill of review the court will look to the essence and objectives of the bill. Schoknecht v. Prassas, 320 Ill. 423. There a bill was filed to review a decree of partition and to set aside a sale and master's deed made to various persons; it was contended that at the time the bill for partition was filed the partitioning plaintiff had no title and the court had no jurisdiction; demurrer was filed on the ground that the bill showed upon its face that it was a bill of review and that the statute of limitations had run; the demurrer was sustained. The Supreme court affirmed this, noting in its opinion that the plaintiff had claimed it was not a bill of review but an original bill to set aside a decree for want of jurisdiction of the trial court, of the parties and of the subject matter. Plaintiff charged fraud on the part of the defendants, but the court held that if this were true it was an error appearing on the face of the record and the bill was strictly a bill of review. This is true of the present case. In Knaus v. Chicago Title & Trust Co., 365 Ill. 588, where the bill sought to invalidate a decree of foreclosure and the certificate of sale and master's deed, the court held that this was in fact a bill of review and governed by the statute of limitations. See also The People v. Sterling, 357 Ill. 354.

Cases cited by plaintiffs to the contrary are not applicable. In Sheaff v. Spindler, 339 Ill. 540, the plaintiff was not a party to the proceeding sought to be set aside, and in other cases cited by plaintiffs the court had acquired only colorable

The complaint before us was not filed until September 6, 1933, more than five years after the entry of the decree of July 12, 1928, hence it is barred by the statute of limitations.

Plaintiff asserts, through an affidavit filed by Mr. Abrams,

that the object of this complaint is not to review the decree of July 12, 1928, but to enforce the decree of January 17, 1933, which,

it is claimed, is still in full force by reason of the alleged nullity of the decree of July 12, 1928. In determining whether any bill is a bill of review the court will look to the essence and objectives of the bill. Johnson v. Presser, 320 Ill. 483. There

a bill was filed to review a decree of partition and to set aside a sale and master's deed made to various persons; it was contended that at the time the bill for partition was filed the partitioning plaintiff had no title and the court had no jurisdiction; defendant was filed on the ground that the bill showed upon its face that it was a bill of review and that the statute of limitations had run; the defendant was sustained. The Supreme Court affirmed this, noting

in its opinion that the plaintiff had claimed it was not a bill of review but an original bill to set aside a decree for want of jurisdiction of the first court, at the parties and of the subject

matter. Plaintiff changed ground on the part of the defendants, but the court said that it was not an error to require the plaintiff to file a bill of review.

This is true of the present case. In Kramer v. Chicago Title & Trust Co., 303 Ill. 588, where the bill sought to invalidate a decree of

foreclosure and the certificate of sale and master's deed, the court held that this was in fact a bill of review and governed by the statute of limitations. See also The People v. Sterling, 337 Ill.

Cases cited by plaintiffs to the contrary are not ap-

propriate. In Shaw v. Graham, 339 Ill. 580, the plaintiff was

not a party to the proceeding sought to be set aside, and in

other cases cited by plaintiffs the court had acquired only jurisdiction

jurisdiction by reason of false testimony. In Beck v. Lash, 303 Ill. 549, 556, it was held that it was only fraud which gives the court colorable jurisdiction that renders the decree void as to all parties affected.

In the instant case the complaint alleges that the bank trustee and Becker & Company had violated their trust duties in that Becker & Company had not reimbursed the trustee for taxes. There are general allegations that though the bank trustee and Becker & Company had organized a committee for the ostensible purpose of protecting the interests of the investors, it was in reality the agency of Becker & Company. The entire body of the complaint is directed against the validity of the actions of the bank trustee and Becker & Company. It clearly was a bill of review.

Other points are made by defendants justifying the order dismissing the complaint. We shall notice only one of these, namely, that all the charges made in the complaint have heretofore been adjudicated against the plaintiffs. In the case of Tetzke v. Trust No. 2988 of Foreman Trust & Savings Bank, 85 F. (2d) 942, decided by the United States Circuit Court of Appeals, the court held that after an examination of the record upon the merits, no error was found. The additional abstract filed in the present case shows that the objections filed to the master's report in that cause were in substance the same as appear in plaintiffs' present complaint. Also, in the brief filed in the United States Circuit Court of Appeals the claims there made against the decree of July 12, 1933, are in substance the same as are now presented in the instant case. It should be remembered that in the United States Circuit Court case the court held against these claims after considering the case upon the merits.

These issues were presented in the Superior court of Cook county and dismissed July 12, 1935, in the case of Schero v. Brown, No. 10595. In the present case the trial court rendered an opinion,

jurisdiction by reason of false testimony. In Bank v. Bank, 308 Ill. 419, 550, it was held that it was only fraud which gives the court exclusive jurisdiction that renders the decree void as to all parties affected.

In the instant case the complaint alleges that the bank, Bank and Bank & Company had violated their trust duties in that Bank & Company had not reimbursed the trustee for taxes. There are general allegations that though the bank trustee and Bank & Company had organized a committee for the ostensible purpose of protecting the interests of the investors, it was in reality the agent of Bank & Company. The entire basis of the complaint is directed against the validity of the actions of the bank trustee and Bank & Company. It is stated that a bill of review.

Other points are made by defendants justifying the request dismissing the complaint. We shall notice only one of these, namely, that all the issues were in the complaint and therefore were adjudicated against the plaintiffs. In the case of Bank v. Bank, 308 Ill. 419, 550 of Bank v. Bank, 308 Ill. 419, 550 decided by the United States Circuit Court of Appeals, the court held that after an examination of the record upon the merits, no error was found. The additional abstract filed in the present case shows that the objections filed to the master's report in that cause were in substance the same as appear in plaintiffs' present complaint. Also, in the brief filed in the United States Circuit Court of Appeals the claims there made against the decree of July 12, 1935, are in substance the same as are now presented in the instant case. It should be remembered that in the United States Circuit Court case the court held against these claims after considering the case upon the merits.

These issues were presented in the instant cause at law, and dismissed July 12, 1935, in the case of Bank v. Bank, 308 Ill. 419, 550. In the present case the trial court rendered an opinion,

when it dismissed plaintiffs' complaint, to the effect that all of the matters alleged in the complaint had been already adjudicated. The record supports this conclusion.

For the reasons above given the order of the trial court dismissing the complaint is affirmed.

AFFIRMED.

Matchett, P. J., and O'Connor, J. concur.

and is almost identical, as the others that all of
 the subjects listed in the synopsis had been already addressed.
 The record supports this conclusion.
 For the record there the copy of the first report
 attaching the synopsis is attached.

REMARKS

REMARKS: V. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

40578

ALLAN M. LOEB, ERNEST G. LOEB, and
THOMAS H. LOEB,

Appellants,

vs.

GENERAL ACCEPTANCE COMPANY, a
corporation,

Appellee.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

302 I.A. 195

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

July 8, 1936, plaintiffs filed their complaint in chancery against defendant praying for an accounting and for the partition of certain real estate. Defendant, after answering, filed its counterclaim. After the pleadings were settled the cause was referred to a master in chancery who took the evidence and made up his report. Afterward a decree was entered substantially in accordance with the recommendation of the master. Both parties being dissatisfied, plaintiffs appeal from certain portions of the decree and defendant prosecutes a cross appeal as to other parts of the decree.

The record discloses that in 1933 the defendant was engaged in the business of purchasing at discount, mechanic's lien paper, building contractors' accounts, second mortgages, and the like. Plaintiffs were the owners of one-half of the common and two-thirds of the preferred stock of defendant corporation. Seymour Marks, president of the defendant company, owned the other half of the common stock and the remaining one-third of the preferred stock. On account of the depression there were very few mechanic's lien claims offered for sale and it was decided to discontinue the buying of such paper. Afterward plaintiffs wanted to withdraw from the business and to liquidate the assets of the company. To bring this about, Marks bought some of plaintiffs' preferred stock so that the three plaintiffs owned one-half of the stock and Marks one-half. Some time after this, April 30, 1935,

3021A.195

MR. JUSTICE OF COMMONS DELIVERED THE VERDICT OF THE COURT.

ALICE E. LORRY, Plaintiff,
vs.
JOHN E. LORRY, Defendant,
General Accounting Corporation,
Defendant.

U.S. DISTRICT COURT,
SOUTHERN DISTRICT OF NEW YORK.

July 8, 1933, Plaintiff filed their complaint in chancery against defendant praying for an accounting and for the partition of certain real estate. Defendant, after answering, filed its counterclaim. After the pleadings were settled the cause was referred to a master in chancery who took the evidence and made up his report. Afterward a decree was entered substantially in accordance with the recommendation of the master. Both parties being dissatisfied, Plaintiff appeal from certain portions of the decree and defendant prosecuted a cross appeal as to other parts of the decree.

The record discloses that in 1915 the defendant was engaged in the business of purchasing at discount, mechanic's lien paper, building contractors' accounts, second mortgages, and the like. Plaintiff were the owners of one-half of the common and two-thirds of the preferred stock of defendant corporation. Guyman Marks, president of the defendant company, owned the other half of the common stock and the remaining one-third of the preferred stock. On account of the depression there were very few mechanic's lien claims offered for sale and it was decided to discontinue the buying of such paper. Afterward Plaintiff wanted to withdraw from the business and to liquidate the assets of the company. To bring this about, Marks bought some of Plaintiff's stock and Marks one-half, some time after this, April 30, 1933, Marks and Marks one-half, some time after this, April 30, 1933, Plaintiff claim no that the three Plaintiff owned one-half of the

the parties entered into a written contract for liquidating the assets of the company. Under this agreement plaintiffs sold their stock to the defendant company in payment of which defendant turned over to plaintiffs certain assets consisting of real and personal property and defendant retained an equivalent amount. The remainder of the assets, which consisted of both real and personal property and designated "Segregated Assets" which were not readily divisible were to be retained by defendant company for one year but it was provided that such assets were the joint property of plaintiffs and defendant. Defendant was given the sole management and control of the assets and authorized to make collections of them until April 30, 1936. For such services plaintiffs agreed to pay \$80 per week to defendant in part payment of the salary of Seymour Marks who was president and manager of defendant. Plaintiffs also agreed to pay one-half of the expenses incurred by defendant in liquidating the assets. The contract also provided the defendant "shall have the full right and authority to transact any business that it may see fit in addition to the management and collection of the segregated assets, and to make use of its entire office space, phones and all of its employees for its own exclusively private purposes."

The contract then recited that defendant had outstanding obligations aggregating approximately \$16,000 "due to customers from time to time upon collection of items; and for the purpose of providing an operating fund for the payment of said items," (as well as other obligations of defendant company which plaintiffs were obligated to pay one-half and defendant the other half), it was agreed that plaintiffs and defendant should each deposit forthwith \$10,000 with defendant for such purposes; that such \$20,000 should be kept in a separate bank account but that defendant might draw against this money to pay expenses in administering the "Segregated Assets" and to pay other obligations; that as soon as defendant had collected from the assets \$5,000 or more, in addition

the parties entered into a written contract for liquidating the assets of the company. Under this agreement plaintiffs sold their stock to the defendant company in payment of which defendant turned over to plaintiffs certain assets consisting of real and personal property and defendant retained an equivalent amount. The remainder of the assets, which consisted of both real and personal property and designated "segregated assets" which were not readily divisible were to be retained by defendant company for one year but it was provided that such assets were the joint property of plaintiffs and defendant. Defendant was given the sole management and control of the assets and authorized to make collections of them until April 30, 1936. For such services plaintiffs agreed to pay \$80 per week to defendant in part payment of the salary of Raymond Marks who was president and manager of defendant. Plaintiffs also agreed to pay one-half of the expenses incurred by defendant in liquidating the assets. The contract also provided the defendant "shall have the full right and authority to transact any business that it may see fit in addition to the management and collection of the segregated assets, and to make use of its entire office space, phones and all of its employees for its own exclusively private purposes."

The contract then recited that defendant had outstanding obligations aggregating approximately \$16,000 "due to customers from time to time upon collection of items; and for the purpose of providing an operating fund for the payment of said items," (as well as other obligations of defendant company which plaintiffs were obligated to pay one-half and defendant the other half), it was agreed that plaintiffs and defendant should each deposit forthwith \$10,000 with defendant for such purpose; that such \$20,000 should be kept in a separate bank account but that defendant might draw against this money to pay expenses in administering the "segregated assets" and to pay other obligations; that as soon as defendant had collected from the assets \$5,000 or more, in addition

to the \$20,000, defendant should pay plaintiffs one-half of such sum, less certain expenses and "It is expressly understood and agreed, however, that on April 30, 1936" defendant "shall turn over and deliver to" plaintiffs "after the discharge of all of the debts and obligations referred to in this agreement, their share of the net balance that may then remain including their one-half share of the operating fund," (\$20,000) or of the remainder of it which might then be on hand. "The remaining segregated assets shall be equally divided and distributed in such manner as may be mutually agreed upon between the parties."

The contract further provided that plaintiffs were to indemnify defendant by paying one-half of all the liability, etc., and defendant was authorized to deduct from collections it made or from the \$20,000 fund "sufficient sums to satisfy and discharge the obligations" of plaintiffs "and in default of such deductions" by defendant, plaintiffs agreed to pay to defendant "one-half of each of such liabilities as soon as the same shall be legally established, or as soon as the Purchaser shall have paid out or become liable for" such liabilities.

While the matter was pending before the master, the parties entered into a written stipulation under which practically all of the segregated assets were sold by the master November 19, 1936. The rights of the parties, it was expressly stipulated, should be in no manner waived or impaired by such sale.

Under the contract of April 30, 1935 (which ran for one year, under which defendant was liquidating the segregated assets and also conducting some of its own business), all costs and expenses incurred by defendant, including salaries, rent, telephone, etc., were charged against the proceeds derived from the segregated assets and, as we understand the record, no complaint is made as to such charges or expenses, but plaintiffs object to certain expenses made during the period from May 1, 1936 to November 19, 1936, at which later date the assets were sold. During that period, nearly

to the \$20,000, defendant should pay plaintiff one-half of such sum, less certain expenses and "It is expressly understood and agreed, however, that on April 30, 1936" defendant "shall turn over and deliver to" plaintiff "after the discharge of all of the debts and obligations referred to in this agreement, their share of the net balance that may then remain including their one-half share of the operating fund," (\$20,000) or of the remainder of it which might then be on hand. "The remaining segregated assets shall be equally divided and distributed in such manner as may be mutually agreed upon between the parties."

The contract further provided that plaintiff's were to indemnify defendant by paying one-half of all the liability, etc., and defendant was authorized to deduct from collections it made or from the \$20,000 fund "such amounts as may be necessary and appropriate to satisfy any obligations" of plaintiff's "and in default of such deductions" by defendant, plaintiff's agreed to pay to defendant "one-half of each of their liabilities as soon as the same shall be legally established, or as soon as the purchaser shall have paid out or become liable for" such liabilities.

While the matter was pending before the master, the parties agreed into a written stipulation under which practically all of the segregated assets were sold by the master November 19, 1936. The rights of the parties, it was expressly stipulated, should be in no manner altered or limited by such sale.

Under the contract of April 30, 1936 (which ran for one year, under which defendant was liquidating the segregated assets and also conducting some of its own business), all costs and expenses incurred by defendant, including salaries, rent, telephone, etc., were charged against the proceeds derived from the segregated assets and, as we understand the record, no complaint is made as to such charges or expenses, but plaintiff's object to certain expenses made during the period from May 1, 1936 to November 19, 1936, as follows: During that period, nearly

seven months, defendant made collections from the segregated assets totalling \$13,052.28 - \$3,637.62 from real estate and \$9,414.66 from other assets. The disbursements made in the same period were \$12,583.91, made up of the following items: (1) Out-of-pocket expenses attributable to real estate, \$2,287.54, (2) Out-of-pocket expenses attributable to other assets, \$1,724.73, total \$4,012.27, (3) General overhead expenses of defendant corporation, \$8,574.64. It is to this last item of expense that plaintiffs object. They say that Seymour Marks, president and sole owner of the defendant company during the seven months, drew a salary of \$160 a week, or \$4,480; that the rent of the office occupied by defendant was \$200 per month; salaries for office employees and all other expenses were charged against the segregated assets and were so allowed by the master and chancellor, and plaintiffs contend that this \$8,574.64 should be borne by the defendant or Marks and none of it charged against plaintiffs or against the segregated assets of which plaintiffs were one-half owners.

On the other side, defendant argues that the decree, in this respect, is proper because the expenses were reasonable and necessarily incurred in preserving, conserving and protecting the joint assets.

As sustaining their respective positions, counsel for each side make a number of propositions supported by numerous authorities but we think it would serve no useful purpose to analyze or mention these several propositions for we are of opinion that the evidence shows that the charges made were reasonable and necessary. But we are further of opinion that such expenses ought not to be charged solely against segregated assets because defendant's own witnesses, including Marks, gave testimony to the effect that about 80% of the work done during the seven months by defendant's employees was required in connection with the segregated assets and about 20% to the defendant's private business, and there is no evidence to the contrary. We are therefore of opinion that the over-

seven months, defendant made collections from the segregated assets totaling \$15,082.23 - \$3,837.62 from real estate and \$2,414.62 from

other assets. The disbursements made in the same period were

\$12,562.91, made up of the following items: (1) Out-of-pocket ex-

penses attributable to real estate, \$2,837.54; (2) Out-of-pocket

expenses attributable to other assets, \$1,724.77; (3) \$2,010.57;

(4) General overhead expenses of defendant corporation, \$2,574.64.

It is to this last item of expense that plaintiff object. They

say that Seymour Marks, president and sole owner of the defendant

company during the seven months, drew a salary of \$180 a week, or

\$4,480; that the rent of the office occupied by defendant was \$200

per month; salaries for office employees and all other expenses were

charged against the segregated assets and were so allowed by the

master and chancellor, and plaintiff contend that this \$2,574.64

should be borne by the defendant or Marks and none of it charged

against plaintiff or against the segregated assets of which plain-

tiffs were one-half owners.

On the other side, defendant argues that the decree, in

this respect, is proper because the expenses were reasonable and

necessarily incurred in preserving, conserving and protecting the

joint assets.

As sustaining their respective positions, counsel for each

side make a number of propositions supported by numerous authorities

but we think it would serve no useful purpose to analyze or mention

these several propositions for we are of opinion that the evidence

shows that the charges were reasonable and necessary. But we

are further of opinion that such expenses ought not to be charged

solely against segregated assets because defendant's own

witnesses, including Marks, gave testimony to the effect that about

80% of the work done during the seven months by defendant's em-

ployees was required in connection with the segregated assets and

about 20% to the defendant's private business, and there is no

evidence to the contrary. We are therefore of opinion that the over-

head expenses should be divided, 20% charged to the defendant and 80% against the segregated assets, one-half of which must ultimately be borne by plaintiffs and the other half by defendant. Twenty per cent of \$8,574.64 is \$1,714.92, leaving \$6,859.72 to be charged against the proceeds of the segregated assets.

In its cross appeal defendant contends it should be awarded \$1,250 for attorneys' fees upon its counterclaim for partition of the real estate which was a part of the segregated assets; that plaintiffs in their complaint had not properly set forth the interest of the parties in the real estate which necessitated the filing of the counterclaim. The master found that the parties (in stipulating for the sale of most of the assets, as above stated, by the master), provided for the manner of the sale and disposition of the real estate and that the proceeds of such sale be "divided in two equal parts or funds, one of which shall be paid to the plaintiffs collectively and the other to the defendant;" that no mention was made of attorneys' fees and that such question was not saved although the parties in agreeing to the sale stipulated that the remedies of the parties should in no way be impaired. We agree with the master and the chancellor. Moreover, section 40 of the Partition Act (sec. 40, chap. 106, Ill. Rev. Stats. 1939), provides for the allowance of fees for "plaintiff's solicitor" where there is substantially no controversy. Moskovitz v. Chester Arthur Wood, et al., No. 40613, opinion filed October 3, 1939, and cases there cited. See also Cowdrey v. Hitchcock, 103 Ill. 262.

In Hynes v. Jennings, 262 Ill. 268, it was held that it was improper for a master to hear evidence with reference to attorneys' fees in a partition proceeding until a decree had been entered. In the instant case, no such decree was entered and there was no error in disallowing this item.

Counsel for defendant in their cross appeal contend that "The decree should have ordered payment of the unpaid obligations of the defendant involved in the segregated assets, or at least

and expenses should be divided, 20% charged to the defendant and 80% against the segregated assets, one-half of which must necessarily be borne by plaintiffs and the other half by defendant. Twenty per cent of \$8,574.64 is \$1,714.93, leaving \$6,859.71 to be charged against the proceeds of the segregated assets.

In the cross appeal defendant contends it should be awarded \$1,714.93 for attorneys' fees and the costs of the partition of the

real estate which was a part of the segregated assets; that plaintiffs in their complaint had not properly set forth the interest of the parties in the real estate which necessitated the filing of the counterclaim. The master found that the parties (in stipulating for the sale of most of the assets, as above stated, by the master),

provided for the manner of the sale and disposition of the real estate and that the proceeds of such sale be "divided in two equal parts or funds, one of which shall be paid to the plaintiffs collectively and the other to the defendant;" that no mention was made of attorneys' fees and that such question was not saved although the parties in agreeing to the sale stipulated that the remedies of the parties should in no way be impaired. We agree with the master and the chancellor. Moreover, section 40 of the Partition Act (sec. 40, Chap. 104, Ill. Rev. Stat. 1901), provides for the allowance of fees for "plaintiff's solicitor" where there is substantially

no controversy. Moskovitz v. Greaser Arthur Wood, et al., No. 40813, 209 Ill. App. 2d 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

In Lyons v. Jennings, 202 Ill. 208, it was held that it was improper for a master to hear evidence with reference to attorneys' fees in a partition proceeding until a decree had been entered. In the instant case, no such decree was entered and there was no error in disallowing this item.

Counsel for defendant in their cross appeal contend that the cross appeal should be reversed on the ground that the master should have heard evidence as to the amount of attorneys' fees and the costs of the partition of the real estate which was a part of the segregated assets; that plaintiffs in their complaint had not properly set forth the interest of the parties in the real estate which necessitated the filing of the counterclaim. The master found that the parties (in stipulating for the sale of most of the assets, as above stated, by the master), provided for the manner of the sale and disposition of the real estate and that the proceeds of such sale be "divided in two equal parts or funds, one of which shall be paid to the plaintiffs collectively and the other to the defendant;" that no mention was made of attorneys' fees and that such question was not saved although the parties in agreeing to the sale stipulated that the remedies of the parties should in no way be impaired. We agree with the master and the chancellor. Moreover, section 40 of the Partition Act (sec. 40, Chap. 104, Ill. Rev. Stat. 1901), provides for the allowance of fees for "plaintiff's solicitor" where there is substantially

no controversy. Moskovitz v. Greaser Arthur Wood, et al., No. 40813, 209 Ill. App. 2d 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

should have protected the defendant against future liability thereon." In support of this counsel say that on April 30, 1936, defendant corporation "still remained personally obligated to various contractors from whom accounts were purchased, upon unpaid liabilities" of \$12,629.21 which amount had been subsequently reduced by reason of settlements with some of the contractors. In this connection the master found that the \$20,000 above mentioned (of which plaintiffs advanced \$10,000), was placed in an "operating fund to take care of certain obligations;" that the contract provided these obligations might be paid on or before April 30, 1936 by defendant, but not afterward. The master also found there was no oral agreement subsequent to the making of the contract, whereby defendant should retain any of this fund beyond April 30, 1936; that the contract expressly provided that on April 30, 1936, defendant should turn over to plaintiffs their one-half of the amount then remaining in the operating fund and recommended that defendant be required to at once account to plaintiffs for one-half of such funds remaining. This was approved by the chancellor. The master further found that in subsequent payments which defendant was required to make to such contractors, one-half should be borne by plaintiffs, and that if and when defendant paid any such contractor it was to be indemnified for one-half of such payment by plaintiffs. This was according to the terms of the contract. His finding was approved by the chancellor.

The evidence tends to show that it was agreed by plaintiffs and defendant that no voluntary payments should be made by defendant to such contractors but that such payment should be avoided; "that when a contractor would demand payment, same would be made only after an attempt at compromise," that this was the custom and usage of the parties in the conduct of their business. Continuing, counsel for defendant say "Loeb, in his testimony admitted that the company customarily held back in all cases in which it did not believe an application for payment would be made, and that in about fifty per cent of the cases it was the policy of the company to defer

should have protected the defendant against future liability there-
in. In support of this amount was found on April 30, 1936, defendant
corporation "still remained personally obligated to various con-
tractors from whom accounts were purchased, upon unpaid liabilities"
of \$12,629.21 which amount had been subsequently reduced by reason
of settlements with some of the contractors. In this connection
the master found that the \$20,000 above mentioned (of which plain-
tiff advanced \$10,000), was placed in an "operating fund to take
care of certain obligations;" that the contract provided these
obligations might be paid on or before April 30, 1936 by defendant,
but not afterwards. The master also found there was no oral agreement
subsequent to the making of the contract, whereby defendant should
retain any of this fund beyond April 30, 1936; that the contract ex-
pressly provided that on April 30, 1936, defendant should turn over
to plaintiffs their one-half of the amount then remaining in the
operating fund and recommended that defendant be required to set aside
account to plaintiffs for one-half of such funds remaining. This
was approved by the chancellor. The master further found that in
subsequent payments which defendant was required to make to such
contractors, one-half should be borne by plaintiffs, and that if and
when defendant paid any such contractor it was to be indemnified for
one-half of such payment by plaintiffs. This was according to the
terms of the contract. His finding was approved by the chancellor.
The evidence tends to show that it was agreed by plain-
tiffs and defendant that no voluntary payments should be made by
defendant to such contractors but that such payment should be
avoided; "that when a contractor would demand payment, same would be
made only after an attempt at compromise," that this was the custom
and usage of the parties in the conduct of their business. Continu-
ing, counsel for defendant say "and, in his testimony admitted that
the company customarily held back in all cases in which it did not
believe an obligation for payment would be made, and that it should
this part of the record it was the policy of the company to delay

payments, the company determining not to voluntarily pay out to contractors."

From an examination of the record and the briefs of both parties, it appears that it was the agreed custom not to pay any contractor who had a valid claim unless and until he made a demand, and not then if the matter could be settled for less than the amount of the claim. A court of chancery does not approve of this practice. Plaintiffs were not entitled to have defendant turn over to them one-half of the moneys remaining in this fund. Neither are we of opinion that defendant should keep such funds in its possession, but in view of all the facts, we will not disturb the decree in this respect.

The decree of the Circuit court of Cook county is modified and the matter is remanded for further proceedings in accordance with the views herein expressed. Each party will be required to pay one-half of the court costs in this and in the trial court out of the remaining segregated assets.

DECREE MODIFIED AND CAUSE REMANDED.
WITH DIRECTIONS.

Matchett, P. J., and McSurely, J., concur.

payments, the company determining not to voluntarily pay out to

From an examination of the record and the briefs of both

parties, it appears that it was the agreed custom not to pay any

contractor who had a valid claim unless and until he made a demand,

and not then if the matter could be settled for less than the amount

of the claim. A court of chancery does not approve of this practice.

Plaintiffs were not entitled to have defendant turn over to them

one-half of the moneys remaining in this fund. Neither are we of

opinion that defendant should keep such funds in its possession, but

in view of all the facts, we will not disturb the decree in this

The decree of the Circuit court of Cook county is modi-

fic and the matter is remanded for further proceedings in accordance

with the views herein expressed. Each party will be required to pay

one-half of the court costs in this and in the trial court out of

the remaining segregated assets.

WITH DIRECTIONS.

WATSON, J., and McHENRY, J., concur.

39443

I. ALLISON, F. C. HASSE
and E. S. RICHARDSON,

Appellants,

v.

R. J. BEATTY and JOHN T. BEATTY,
Appellees.

APPEAL FROM CIRCUIT COURT,

COOK COUNTY.

3021A.412

MR. PRESIDING JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

This appeal by plaintiffs, I. Allison, F. C. Hasse and E. S. Richardson, seeks to reverse a decree dismissing their amended complaint for specific performance for want of equity.

Inasmuch as the pleadings have a vital bearing upon the determination of the issues involved, it is necessary that same be set forth fully. Plaintiffs' amended complaint is as follows:

"1. I. Allison, is an engineer by profession and has devoted years of study and experimentation in connection with radio receiving sets and talking machines; that after the expenditure of much time, labor and expense, he developed devices and improvements in connection with radio receiving sets and talking machines;

"2. F. C. Hasse and E. S. Richardson, assisted I. Allison, in developing said devices and improvements and are financially interested therein;

"3. On or about the 1st of October, 1929, R. J. Beatty and John T. Beatty, were interested in the manufacture of radio receiving devices and talking machines; they were the principal owners of the stock of the United Air Cleaner Corporation, which was engaged in the manufacture of radio receivers and phonographs with a factory located at No. 9705 Cottage Grove avenue in the City of Chicago; said corporation did an extensive business; its factory contained about sixty thousand square feet, with ground space of about six acres; R. J. Beatty and John T. Beatty were desirous of improving the quality of the apparatus they manufactured and with that end in view, on or about the 1st of October, 1929, began an investigation of complainants' devices and entered into negotiations with a view to purchasing the rights of complainants in said devices and improvements; numerous interviews were had between R. J. Beatty and John T. Beatty and complainants with reference to the acquiring of said rights; Beattys were shown a working model of a radio receiving set with said devices attached; said devices are of a simple nature and can easily be applied to any amplifier circuit; at those interviews it was explained that said devices had been placed in the hands of patent attorneys for applications for patents but that no patents had been issued and the applications had not been passed upon;

"4. That after numerous interviews and demonstrations

U. S. DISTRICT COURT
SOUTHERD DISTRICT OF NEW YORK
In re: J. Edgar Hoover and
Alvin Karpis

vs.

U. S. DEPARTMENT OF JUSTICE
Plaintiff

303 T.A. 118

THE FOLLOWING JUSTICE BELIEVES THE CASE TO BE A MATTER OF THE COURT

While signed by Plaintiff, J. Edgar Hoover and

H. S. Richardson, seeks to reverse a decree dismissing their amended complaint for specific performance for want of equity. Inasmuch as the pleadings have a vital bearing upon the determination of the issues involved, it is necessary that some be set forth fully. Plaintiff's amended complaint is as follows:

"1. J. Edgar Hoover, as an engineer, inventor and the developer of many and important inventions in connection with radio receiving sets and talking machines; that after the above-mentioned inventions in connection with radio receiving sets and talking machines;

"2. T. C. Harbo and H. S. Richardson, assisted J. Edgar Hoover, in developing said devices and inventions and are financially interested therein;

"3. On or about the 1st of October, 1935, J. Edgar Hoover and John T. Duddy, were interested in the manufacture of radio receiving devices and talking machines; they were the principal owners of the stock of the United Airplane Corporation, which was engaged in the manufacture of radio receivers and phonographs with a factory located at No. 3705 Cottage Grove Avenue in the City of Chicago; said corporation is an extensive business; the factory contained about sixty thousand square feet, with ground space of about six acres; J. Edgar Hoover and John T. Duddy were partners in the operation of the apparatus they manufactured and with that was in view, on or about the 1st of October, 1935, began an investigation of complainants' devices and entered into negotiations with a view to purchasing the rights of complainants in said devices and inventions; minutes of these negotiations were taken between J. T. Duddy and John T. Duddy and complainants with reference to the acquisition of said rights; Duddy was shown a working model of a radio receiving set with said devices attached; said devices are of a radio nature and can easily be applied to any receiver; as these inventions it was explained that said devices had been placed in the hands of patent attorneys for applications for patents but that no patents had been issued and the applications had not been passed upon;

"4. That after numerous interviews and demonstrations

of the results of the use of said appliances and devices before R. J. Beatty and John T. Beatty and their radio engineers, an agreement was entered into between complainants and R. J. Beatty and John T. Beatty; said agreement was thereafter on or about the 7th day of January, 1930, reduced to writing and signed by complainants and R. J. Beatty and John T. Beatty;

"5. Said contract follows:

"Know all men by these presents that the copartnership known as 'Allison, Masse and Richardson' of the City of Chicago, Cook County, Illinois, hereafter to be known as the 'Associates' hereby agree to sell, assign and transfer to the Beattys, Sr. R. J. and Jr. J. T. also of Chicago, Cook County, Illinois, hereafter to be known as the 'Buyers,' such Radio and talking machine improvements as are set forth in Patents applied for and fully described therein, demonstration of which devices and improvements has been made by Mr. Allison in his working model to the Buyers to their entire satisfaction and which quality and performance the Associates guarantee to reproduce ~~in the daily radio output of the Buyers within their present cost of manufacture, which costs have been given to Mr. Allison.~~

(Insert)

"The Associates have extended a proposal to the Buyers on this 7th day of January, 1930, covering the above mentioned transfer of assets to them and same has been accepted by the Buyers, the main details of which are set forth as follows:

"Upon the signing of this agreement by all parties concerned, the Buyers will take the following action at once.

"1. Tender the Associates \$10,000 in cash within 30 days.

"2. Transfer three hundred and twenty-five (325) shares of United Air Cleaner Capital Stock (accepted in this instrument at a valuation placed upon it by the Buyers of \$200 per share) proportionately in the individual names of T. Allison; F. C. Masse and E. S. Richardson.

"3. Sign an agreement with the Associates to repurchase these 325 shares from them at \$300 per share on or before the expiration of two years following date of original agreement; (this repurchase price of \$300 per share was offered by the Buyers).

"4. Execute instruments with Associates for the further payment to them of \$5,000 in cash on four, six and nine months after date of agreement or a total of \$15,00 cash, plus the initial \$10,000 cash payment making a total cash payment to the Associates of \$25,000 within nine months of the date of this agreement. These three deferred \$5,000 payments are to bear six per cent (6%) interest for their duration.

"5. This original agreement also provides that these devices and improvements can and shall be offered to other manufacturers of radio, talking and moving picture machines on a license or royalty basis and the Associates are to receive one-third of all such income as may be derived from furnishing same to other manufacturers or on the total output of all such manufacturers who may be licensed to use these devices; and the Buyers are to use their best efforts to make as many of these leases to other manufacturers as possible.

"In witness whereof, the said parties have hereunto set their hands and seals, the day and year first above mentioned.

The Buyers

(John T. Beatty
(R. J. Beatty

The Associates

(F. C. Hasse
(I. Allison
(E. S. Richardson

Witness:

C. W. Malcolm

"INSERT:

in production at a cost not to exceed that of the present cost of audio circuits using 245 tubes, or 210 tubes or 250 tubes.

"6. It is further understood that any developments pertaining to radio receivers, speakers or pickups or radio phonographs used in amateur broadcast reception brought about by the Associates within a period of two years from date of this agreement, shall be turned over in whole to the buyers, expense covering same to be borne by the buyers.

The Buyers

(John T. Beatty
(R. J. Beatty

The Associates

(F. C. Hasse
(I. Allison
(E. S. Richardson

Witness:

C. W. Malcolm

"6. After the execution of said agreement the Beattys and their engineer and radio experts examined the mechanical construction of said devices as shown by the model exhibited to them, and complainants proceeded to construct another model for the use of said Beattys, and requested the Beattys to transfer to complainants 325 shares of United Air Cleaner Corporation capital stock mentioned in said contract, and at the expiration of thirty days after execution of said contract requested Beattys to pay said sum of ten thousand dollars as provided in said contract; Beattys failed and refused to turn over said shares of United Air Cleaner Corporation capital stock, and failed and refused to pay said sum of ten thousand dollars, or any other amount and fail and refuse to carry out said contract, and refuse to execute instruments for said Fifteen thousand dollars further payments.

"7. Complainants are informed and believe that the Beattys after the examination of complainants' model, by themselves and their engineers, after the signing of said contract, made partial use of said devices and improvements, and applied same to their radio, and by making use of the knowledge gained by the examination of said devices they greatly improved the quality of the radio receiving sets manufactured by them, and for that reason fraudulently

John A. Smith
John A. Smith

The Association

John A. Smith
John A. Smith
John A. Smith

Witness:
C. A. Smith

in connection of a case not to exceed that of the present cost
of radio circuit (25) tubes, or 250 tubes

"It is further understood that any development
pertaining to radio receivers, speakers or pickups or radio
components used in amateur broadcast reception brought about
in the Association within a period of two years from date of
this agreement, shall be turned over in whole to the buyers,
expense covering same to be borne by the buyers.

The Buyers

John A. Smith
John A. Smith

The Association

John A. Smith
John A. Smith
John A. Smith

Witness:
C. A. Smith

"It is further understood that any development
pertaining to radio receivers, speakers or pickups or radio
components used in amateur broadcast reception brought about
in the Association within a period of two years from date of
this agreement, shall be turned over in whole to the buyers,
expense covering same to be borne by the buyers.

"It is further understood that any development
pertaining to radio receivers, speakers or pickups or radio
components used in amateur broadcast reception brought about
in the Association within a period of two years from date of
this agreement, shall be turned over in whole to the buyers,
expense covering same to be borne by the buyers.

refused and still refuse to carry out said agreement on their part.

"8. Beattys are wrongfully and fraudulently refusing to carry out said contract, and are through said United Air Cleaner Corporation wrongfully and fraudulently making use of said devices and improvements and the principles in connection therewith developed by I. Allison, without giving complainants the benefits to which they are entitled under the contract.

"9. Complainants caused an assignment to be drawn up assigning all right, title and interest in and to said devices and patent application to R. J. Beatty and John T. Beatty, and are ready, able, willing and hereby offer to turn the same over to said Beattys, and are ready, able, willing to hereby offer to do and perform any other act and deed which may be deemed necessary to transfer to said Beattys the full title and benefit to said devices and improvements and all rights under and by virtue of said application for letters patent.

"10. Complainants are ready and have been since the signing of said agreement, to carry out the acts and deed therein provided, and hereby offer to do and perform the same.

"11. Said devices and improvements exhibited to R. J. Beatty and John T. Beatty can be reproduced in production at a cost not to exceed that of the cost of audio circuits using 245 tubes or 210 tubes or 250 tubes at the time of the entering into said contract.

"Prayer for relief that defendants be decreed specifically to perform said agreement and to transfer 325 shares of the capital stock of the United Air Cleaner Corporation, and to pay the money provided to be paid in said contract; complainants being ready and willing and offering specifically to perform said agreement on their part, etc."

Defendants' demurrer to the amended complaint having been overruled, they filed the following amended answer:

"Defendants neither admit nor deny that I. Allison is an engineer by profession and that he has devoted years of study and experimentation in connection with radio receiving sets and talking machines, or that he developed certain devices and improvements in connection with radio receiving sets and talking machines, but demand strict proof thereof.

"Further answering, defendants have no knowledge as to whether or not F. C. Hasse and E. S. Richardson assisted I. Allison in developing any devices and improvements and became and are financially interested therein, but demand strict proof thereof.

"Further answering, defendants admit that on or about the 1st day of October, 1929, they were interested in the manufacture of radio receiving devices and talking machines, and deny that they are the principal owners of the stock of the United Air Cleaner Corporation, located at 9705 Cottage Grove Avenue, Chicago, Illinois, and admit that they are personally desirous of improving the quality of the apparatus manufactured by the United Air Cleaner Corporation, and deny that they had numerous interviews with complainants. Defendants admit that they were shown a working model of the radio receiving set with devices attached, but that complainants fraudulently and with the intent to defraud these defendants, wholly misrepresenting said device, used a baffle board of a size which is impractical and impossible to use in the manufacture of the device. These defendants, on information and belief, state that the complainants herein have never filed application for patent for the device, and also state, on information and belief, that said device is not something new in the line of radio and is unpatentable.

"Further answering, defendants admit that they signed the document set forth in the Amended Bill on or about the 7th day of January, 1930, as alleged in paragraph four thereof.

"Further answering, defendants deny that after the signing of said document, they examined the mechanical construction of said devices as shown by the model exhibited to them by complainant, I. Allison. Defendants deny that complainants proceeded to construct another model for the use of said Beattys and deny that complainants carried out all of the provisions of the agreement by them to be performed.

"Further answering, defendants deny that they or their engineers made an examination of complainants' model after signing said contract or made any partial use of said devices and improvements, or applied same to their radio.

"Further answering, defendants deny that they or the United Air Cleaner Corporation are wrongfully and fraudulently making use of said devices and improvements and the principles in connection therewith developed by complainants.

"Further answering, defendants say that they have no knowledge as to whether or not complainants have ever instructed their patent attorneys to assign all their right, title and interest in and to said devices and patent application to R. J. Beatty and

John T. Beatty, but, on the contrary state, on information and belief, that no patent has ever been issued to said complainants for said device, and demand strict proof thereof, and deny that complainants have ever performed or tendered the assignment of their patent to these defendants.

"Further answering, defendants deny that complainants are ready, able and willing, and have been ever since the signing of said agreement, to carry out and do and perform all and singular the acts and deeds therein provided.

"Further answering, defendants submit to this Honorable Court that all and every the matters in the Amended Bill of Complaint mentioned and complained of, are matters which may be tried and determined at law, and with respect to which the complainants are not entitled to any relief from a court of equity, and these defendants pray that they shall have the same benefit of this defense as if they had demurred to the complainants' bill, and pray to be hence dismissed with reasonable costs and charges on their above motion wrongfully sustained."

The only evidence introduced by plaintiffs upon the hearing before the master, in addition to the written agreement between the parties upon which this proceeding is predicated, was the testimony of defendants. They both testified they signed the written agreement and that they did not make any payments to plaintiffs, transfer any stock to them or execute the stock repurchase agreement as provided in the aforesaid written agreement; and that no patent application or applications had ever been exhibited to them by plaintiffs. Defendant R. J. Beatty testified that neither he nor his son had paid "the \$10,000 in cash or transferred the stock to plaintiffs" because there was "no occasion for it" and "we had not advanced to that point." At the close of plaintiffs' case defendants rested without offering any evidence.

The report of the master in chancery to whom the cause was referred recommended that plaintiffs' complaint be dismissed for want of equity and a decree was entered in accordance with such recommendation.

Plaintiffs' theory as stated in their brief is as follows: "The plaintiffs offered in evidence the contract in question and placed the two defendants on the stand to prove that they had never performed any of the agreements mentioned. Defendants offered no evidence. It is the complainants' contention that the burden of proof is on defendants; that having established in the first instance

that the defendants had failed to perform, the defense of the defendants was an affirmative one and in the absence of any proof of a defense, a decree for specific performance should be entered. The complainants contend that by the agreement, the defendants were to take certain action 'at once' and that by failing to take such action immediately the defendants breached the contract in limine. It is contended that the relief asked for by the complainants properly comes within the scope of an equitable action inasmuch as what the complainants prayed for was specific performance, not only of payments in cash and the transfer of certain shares of stock, but also of the execution of an agreement to repurchase said shares of stock, and of the execution of certain notes securing the balance of the purchase price."

As to defendants' theory, it is stated in their brief:

"The defendants' theory of the case includes: that their answers put in issue all the material allegations of the bill of complaint including the verity of the existence of the subject matter of the proposed sale - that is, the existence of radio and talking machine improvements, which, the memorandum of January 7th recites, were fully described in 'patents applied for;' the existence at the time of the agreement of sale, or at any time, of any such patent applications; the existence of any assignments of such inventions, executed by the complainants as alleged in the bill of complaint; and also that the complainants completely failed to adduce evidence sufficient to make out any case which entitled them to any relief in equity as prayed in the bill of complaint or which required of the defendants any affirmative defense."

The master in his report found that the only material allegations of plaintiffs' complaint, either admitted or proved, were those as to the execution of the written agreement by defendants and the noncompliance by the latter with the terms of said agreement providing for payment in cash and notes of the amounts stipulated therein and the transfer to plaintiffs of the specified shares of stock and the execution of the stock repurchase agreement. The master's finding as to certain other essential allegations of the amended complaint and his conclusions of law with reference thereto are as

that the defendants had failed to perform, the balance of the defendants was an affirmative one and in the absence of any proof of a defense, a decree for specific performance should be entered. The complainants contend that by the agreement, the defendants were to take certain action 'at once' and that by failing to take such action immediately the defendants breached the contract in limine. It is contended that the relief asked for by the complainants properly comes within the scope of an equitable action inasmuch as what the complainants prayed for was specific performance, not only of payments in cash and the transfer of certain shares of stock, but also of the execution of an agreement to repurchase said shares of stock, and of the execution of certain notes securing the balance of the purchase price."

As to defendants' theory, it is stated in their brief:

"The defendants' theory of the case ineludes: that their answers put in issue all the material allegations of the bill of complaint including the verity of the existence of the subject matter of the proposed sale - that is, the existence of radio and talking machine improvements, which, the memorandum of January 7th recites, were fully described in 'patents applied for'; the existence at the time of the agreement of sale, or at any time, of any such patent applications; the existence of any assignments of such inventions, executed by the complainants as alleged in the bill of complaint; and also that the complainants completely failed to adduce evidence sufficient to make out any case which entitled them to any relief in equity as prayed in the bill of complaint or which required of the defendants any affirmative defense."

The master in his report found that the only material allegations of plaintiffs' complaint, either admitted or proved, were those as to the execution of the written agreement by defendants and the noncompliance by the latter with the terms of said agreement providing for payment in cash and notes of the amounts stipulated therein and the transfer to plaintiffs of the specified shares of stock and the execution of the stock repurchase agreement. The master's finding as to certain other essential allegations of the amended complaint and his conclusions of law with reference thereto are as

follows:

"Amended bill of complaint further alleged that complainants caused an assignment to be drawn up by their patent attorneys, assigning all their right, title and interest in and to said devices and patent application to defendants, and are ready, able and willing and do offer to turn same over to the defendants, and are ready, able and willing and do offer to do and perform any other act and deed which may be deemed necessary to transfer to the defendants the full title and benefit to said devices and improvements and all rights, under and by virtue of said application for letters patent; that the amended bill of complaint further alleges that the complainants are ready, able and willing and have been ever since the signing of said agreement to carry out and do and perform all and singular the acts and deeds therein provided for them to do and perform, and offers to do and perform the same; that the amended bill of complaint further alleges that said devices and improvements exhibited to the defendants can be reproduced in production at a cost not to exceed that of the cost of audio circuits using 245 tubes or 210 tubes or 250 tubes at the time of the entering into of said contract; that the joint and several amended answer alleges that the defendants have no knowledge as to whether or not the complainants have ever instructed their patent attorneys to assign all their right, title and interest in and to said devices and patent application to the defendants, and alleges on information and belief that no patent has ever been issued to said complainants for said devices, and demands strict proof thereof, and deny that the complainants have ever performed or tendered the assignment of their patent to the defendants, and deny that the complainants are ready, able and willing and have been ever since the signing of said agreement, to carry out and do and perform all and singular the acts and deeds therein provided; that the complainants offered no competent evidence as to their readiness, willingness and ability to perform said agreement; that the complainants offered no evidence as to their ability to reproduce the said devices and improvements in production at a cost not to exceed that of the cost of audio circuits using 245 tubes, or 210 tubes or 250 tubes at the time of the entering into of said contract; that the complainants offered no evidence as to having made a tender of performance; that at the hearing before me, the complainants made what they believed to be a tender of performance and then withdrew the same.

"That by the express language of the said agreement hereinabove set forth, it is necessary to refer to a material document not introduced in evidence in order to determine the subject matter of the agreement aforesaid; that the pleadings do not set forth the language of the said document, nor do the proofs adequately describe the said document or the devices or the improvements covered by them.

"That by the express language of the said agreement hereinabove set forth, the said agreement is not complete in itself in that it sets forth only 'the main details;' that all of the terms of the said agreement have not been alleged in the pleadings, nor are they set forth in the proofs.

"That by the express language of the said agreement, the complainants guaranteed to reproduce the said devices and improvements 'at a cost not to exceed that of the present cost of audio circuits using 245 tubes or 210 tubes or 250 tubes;' that the complainants failed to offer evidence as to their ability to reproduce the devices and improvements at the cost aforesaid; that

Follows:

"Amended bill of complaint further alleged that complainants caused an assignment to be drawn up by their patent attorneys, assigning all their right, title and interest in and to said devices and patent application to defendants, and the ready, able and willing defendant and to offer to have same over to the defendants, and are ready, able and willing to do so as soon as he can perform any other act and need which may be deemed necessary to transfer to the defendants the full title and benefit of said devices and improvements and all rights, under and by virtue of said application for patent pending; that the amended bill of complaint further alleged that the complainants were ready, able and willing and have been ever since the signing of said assignment to carry out and do and perform all and singular the acts and deeds therein provided for them to do and perform, and offers to do and perform the same; that the amended bill of complaint further alleged that said devices and improvements were exhibited to the defendants and he reproduced in production at a court not to exceed one of the cost of said devices and improvements or the value of the same at the time of the signing into of said contract; that the joint and several amended answer alleges that the defendants have no knowledge as to whether or not the complainants have ever introduced their patent attorneys to assign all their right, title and interest in and to said devices and patent application to the defendants, and alleges on information and belief that no patent has ever been issued to said complainants for said devices, and demands relief therefor; and that the complainants have ever performed or caused the assignment of their patent to the defendants, and they want the complainants to be ready, able and willing and have been ever since the signing of said assignment to carry out and do and perform all and singular the acts and deeds therein provided; that the complainants offered no competent evidence as to their readiness, ability and willingness to perform said agreement; that the complainants offered no evidence as to their ability to reproduce the said devices and improvements in production at a cost not to exceed that of the cost of said devices and improvements; that the complainants offered no evidence as to having made a copy of performance, that is the evidence before me, the complainants have not been believed to be a matter of performance and that it is the duty of the court to find that by the express language of the said agreement heretofore set forth, it is necessary to refer to a material document not introduced in evidence in order to determine the subject matter of the agreement; that the said devices and improvements were covered by said agreement; that the said agreement is not complete in itself in that it sets forth only 'the said devices', that all of the terms of the said agreement have not been alleged in the pleading, and the court was forced to find in the proofs."

"That by the express language of the said agreement heretofore set forth, the said agreement is not complete in itself in that it sets forth only 'the said devices', that all of the terms of the said agreement have not been alleged in the pleading, and the court was forced to find in the proofs."

"That by the express language of the said agreement heretofore set forth, the said agreement is not complete in itself in that it sets forth only 'the said devices', that all of the terms of the said agreement have not been alleged in the pleading, and the court was forced to find in the proofs."

"That by the express language of the said agreement heretofore set forth, the said agreement is not complete in itself in that it sets forth only 'the said devices', that all of the terms of the said agreement have not been alleged in the pleading, and the court was forced to find in the proofs."

although the record does not show a breach on the part of the complainants of their guaranty aforesaid, it was their duty to show affirmatively their readiness, willingness and ability to comply with the said guaranty.

"That these payments and acts of the defendants were conditions precedent to the obligations of the complainants to transfer to the defendants the assets referred to in the said agreement; that the defendants did not make the payments and perform the acts hereinabove set forth; that, however, recovery by the complainants herein is dependent not upon the weakness of the defense, and not upon the failure of the defendants to comply with the said agreement, but upon the strength of the complainants own case, and their readiness, willingness and ability to comply with the terms of said agreement.

"That the pleadings of the defendants place the complainants upon strict proof of virtually all of the fundamental allegations in the amended bill of complaint, except the execution of the agreement hereinabove set forth; that the failure of the defendants to offer evidence did not amount to an admission of any of the allegations in the amended bill of complaint; that the burden at all times remained upon the complainants to prove by affirmative evidence each and every one of the material allegations of the amended bill of complaint and to prove their case in accordance, in agreement and in correspondence with the material allegations of the said amended bill of complaint; that the complainants have failed to do this.

"That the complainants failed to show affirmatively that the remedy at law for the alleged breaches of contract is inadequate, and I find, as a matter of law and fact, that the remedy at law is adequate."

The decree found "that the complainants by their amended bill of complaint sought specific performance by the defendants of a certain agreement in writing, dated the 7th day of January, 1930, set forth in the said bill of complaint, relating to the sale by the complainants to the defendants of certain 'radio and talking machine improvements as are set forth in patents applied for and fully described therein,' setting forth in the said bill of complaint that the complainants had caused an assignment to be drawn up assigning all of their right, title and interest in and to said devices and patent applications to the defendants, and are ready, able and willing and do offer to turn over same to the defendants, and are ready, able and willing and offer to do and perform any and every act and deed which may be deemed necessary to transfer to the defendants the full title and benefit in said devices and improvements and all rights under and by virtue of said application for letters patent; that the amended

bill of complaint further set forth that the complainants are ready, able and willing and have been ever since the signing of the said agreement to carry out and do and perform all and singular the acts and deeds therein provided for them to do and perform; that the evidence offered by complainants does not support the foregoing allegations and other material allegations of the amended bill of complaint nor prove the existence of subject matter of the alleged contract of sale; that the written memorandum of agreement set forth in the bill of complaint did not contain the complete contract and agreement between the parties, and the complainants offered no evidence further setting forth the complete agreement between the parties; and that the complainants have failed to offer or adduce evidence sufficient to entitle them to any relief in equity as prayed in the said bill of complaint."

Plaintiffs' complaint, as heretofore set forth, was drafted on the theory that improvements in the radio and talking machine art were developed by them; that certain "Patents applied for" fully describing these improvements were in existence at the time of the signing of the written agreement on or about January 7, 1930; that after the signing of said agreement the construction of the device involved was examined by defendants and their engineers; that after they had built another model of said device for defendants they requested payment therefor, which was refused; that a formal assignment to defendants of the right, title and interest of plaintiffs in and to the aforementioned applications for patents had been prepared and that they were ready, willing and able to perform any other act deemed necessary to transfer to defendants full title and benefit to such improvements and all rights under the applications for letters patent; and that they "are ready and have been since the signing of said agreement, to carry out the acts and duties therein provided, and hereby offer to do and perform the same;" and that "said devices and improvements exhibited to R. J. Beatty and John T. Beatty can be reproduced in production at a cost not to exceed that of the cost of audio circuits using 245 tubes or 210 tubes or 250 tubes at the time of the entering into said contract." By

bill of complaint further set forth that the complainants are ready, able and willing and have been ever since the signing of the said agreement to carry out and do and perform all and singular the acts and deeds therein provided for them to do and perform; that the evidence offered by complainants does not support the foregoing allegations and other material allegations of the amended bill of complaint nor prove the existence of subject matter of the alleged contract of sale; that the written memorandum of agreement set forth in the bill of complaint did not contain the complete contract and agreement between the parties, and the complainants offered no evidence further setting forth the complete agreement between the parties; and that the complainants have failed to offer or adduce evidence sufficient to entitle them to any relief in equity as prayed in the said bill of complaint.

Plaintiffs' complaint, as amended and filed, was based on the theory that improvements in the radio and talking machine art were developed by them; that certain "patents applied for" fully describing these improvements were in existence at the time of the signing of the written agreement on or about January 7, 1930; that after the signing of said agreement the construction of the device involved was examined by defendants and their engineers; that after they had built another model of said device for defendants they requested payment therefor, which was refused; that a formal assignment to defendants of the right, title and interest of plaintiffs in and to the aforementioned applications for patents had been prepared and that they were ready, willing and able to perform any other act deemed necessary to transfer to defendants full title and benefit to such improvements and all rights under the applications for letters patent; and that they "are ready and have been since the signing of said agreement, to carry out the acts and duties therein provided, and hereby offer to do and perform the same;" and that "said devices and improvements exhibited to M. J. Bestly and John T. Bestly can be reproduced in production at a cost not to exceed that of the cost of radio circuits using 245 tubes or 250 tubes or 250 tubes at the time of the entering into said contract." By

alleging these essential facts plaintiffs undertook to prove them, and until they did so defendants were under no obligation or burden to rebut any allegation of the complaint.

Plaintiffs' present theory is that to entitle them to the decree for specific performance prayed for in their complaint it was only necessary for them to present evidence that defendants contracted to purchase "such radio and talking machine improvements as are set forth in Patents applied for and fully described therein," and that they failed to pay the specified consideration therefor. It is then claimed that defendants not having paid such consideration plaintiffs were relieved of proving the other material allegations of their complaint; and that allegations of material facts in their complaint which were not specifically denied in defendants' answer must be taken as true and plaintiffs thereby relieved of the burden of producing evidence in support of such allegations.

The first fatal weakness in plaintiffs' position is their failure to show either by allegation or proof even the existence of the subject matter of the contract. Plaintiffs contracted to sell "such radio and talking machine improvements as are set forth in Patents applied for and fully described therein." Surely there is nothing in this portion of the written agreement of the parties to apprise the master, the chancellor or this court as to just what plaintiffs' sold and this is the only language contained therein that purports to identify or describe the property sold. In order to ascertain the subject matter of the sale reference must be had to the instrument designated "Patents applied for," if such there was. No such instrument was presented in evidence. Neither was the original or a copy of such an instrument attached to plaintiffs' complaint nor the contents thereof pleaded in said complaint. Not only is the identity of the property which was the subject matter of the contract not disclosed by the record but it does not appear that a patent was ever applied for in connection therewith. This is the first instance which has come to our attention where specific performance was sought of a contract involving the sale of personal property and there was

alleging these essential facts plaintiffs undertook to prove them, and until they did so defendants were under no obligation or duty to rebut any allegation of the complaint.

Plaintiffs' present theory is that to entitle them to the decree for specific performance prayed for in their complaint it was only necessary for them to present evidence that defendants contracted to purchase "such radio and talking machine improvements as are set forth in patents applied for and fully described therein," and that they failed to pay the specified consideration therefor. It is then claimed that defendants not having paid such consideration plaintiffs were relieved of proving the other material allegations of their complaint; and that allegations of material facts in their complaint which were not specifically denied in defendants' answer must be taken as true and plaintiffs thereby relieved of the burden of producing evidence in support of such allegations.

The first fatal weakness in plaintiffs' position is their failure to show either by allegation or proof even the existence of the subject matter of the contract. Plaintiffs contracted to sell "such radio and talking machine improvements as are set forth in patents applied for and fully described therein." Surely there is nothing in this portion of the written agreement of the parties to apprise the master, the chancellor or this court as to just what plaintiffs' sold and this is the only language contained therein that purports to identify or describe the property sold. In order to ascertain the subject matter of the sale reference must be had to the instrument designated "patents applied for," if such there was. No such instrument was presented in evidence. Neither was the original or a copy of such an instrument attached to plaintiffs' complaint nor the contents thereof pleaded in said complaint. Not only is the identity of the property which was the subject matter of the contract not disclosed by the record but it does not appear that a patent was ever applied for in connection therewith. This is the first instance where it must be said that plaintiffs' position is untenable.

no showing of any kind as to the particular thing or article sold. It was clearly incumbent upon plaintiffs both to allege and prove the existence of the subject matter of the contract and that they had applied for a patent on same. Their failure in this regard is sufficient in itself to bar the relief sought.

It is idle to urge that "by the execution of the contract the transfer of the title was complete" and that "it was then incumbent upon defendants to proceed with performance," when the written agreement specified that it contained only the "main details" of the "proposal" which had been accepted by defendants and when such agreement utterly failed to identify the device or invention sold, except by reference to the instrument designated "Patents applied for," which latter or its contents for some unexplained reason plaintiffs have failed to produce or reveal. In support of their instant contention plaintiffs quote and rely upon the following provision of the Uniform Sales act (Ill. Rev. Stats. 1939, ch. 121-1/2, par. 19, sec. 19, rule 1): "Where there is an unconditional contract to sell specific goods, in a deliverable state, the property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment or the time of delivery, or both, be postponed." The Sales Act specifies that this is merely one of the rules "for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer." It will be noted that subsection 1 of section 18 of the Sales Act provides: "Where there is a contract to sell specific or ascertained goods, the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred." There is no evidence in the record that any "specified goods in a deliverable state" constituted the subject matter of the contract or were in existence at the time the written agreement was signed or at any other time.

That it was not contemplated by even plaintiffs that all that was necessary to transfer and assign the alleged device or invention and the application for patent therefor to the defendants was

no showing of any kind as to the particular thing or article sold. It was clearly incumbent upon plaintiffs both to allege and prove the existence of the subject matter of the contract and that they had applied for a patent on same. Their failure in this regard is sufficient in itself to bar the relief sought.

It is idle to urge that "by the execution of the contract the transfer of title was complete" and that "it was then incumbent upon defendants to proceed with performance," when the written agree-

ment specified that it contained only the "main details" of the "proposal" which had been accepted by defendants and when such agreement utterly failed to identify the device or invention sold, except by reference to the instrument designated "patents applied for," which

latter on its contents for some unexplained reason plaintiffs have failed to produce or reveal. In support of their instant contention plaintiffs quote and rely upon the following provision of the Uniform Sales Act (Ill. Rev. Stat. 1939, ch. 121-1/2, sec. 12, rule 1): "Where there is an unconditional contract to sell specific goods, in a deliverable state, the property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment for the time of delivery, or both, be postponed." The Sales Act specifies that this is merely one of the rules "for ascertaining

the intention of the parties as to the time at which the property in the goods is to pass to the buyer." It will be noted that subsection 1 of section 12 of the Sales Act provides: "Where there is a contract to sell specific or ascertained goods, the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred." There is no evidence in the record that any "specific goods in a deliverable state" constituted the subject matter of the contract or were in existence at the time the written agreement was signed or at any other time.

That it was not contemplated by even plaintiffs that all that was necessary to transfer and assign the alleged device or invention and the application for patent therefor to the defendants was

the execution of the written agreement is clearly indicated by the following averments of their amended complaint:

"That after the execution of said agreement as aforesaid the said Beattys and their engineer and radio experts examined the mechanical construction of said devices as shown by the model exhibited to them by your orator, I. Allison, and your orators proceeded to construct another model for the use of said Beattys. ***

"Your orators further show that they caused an assignment to be drawn up by their patent attorneys assigning all right, title and interest in and to said devices and patent application to said R. J. Beatty and John T. Beatty, and are ready, able, willing and hereby offer to turn the same over to said Beattys, and are ready, able, willing and hereby offer to do and perform any other act and deed which may be deemed necessary to transfer to said Beatty the full title and benefit to said devices and improvements and all rights under and by virtue of said application for letters patent.

"Your orators further show that they are ready, able, and willing, and have been ever since the signing of said agreement, to carry out and do and perform all and singular the acts and deeds therein provided for them to do and perform, and hereby offer to do and perform the same."

In evolving their present unique theory that the allegations of material facts in their complaint must be taken as true because they were not specifically denied by defendants' answer, plaintiffs misapprehended the rules applicable to equity pleading. In the course of their brief and argument, in discussing material facts alleged in their complaint, it is repeatedly asserted that "this was not denied in the answer" or that "this allegation of the amended complaint was not denied." The demurrer which ^{had} been interposed and overruled did admit the truth of all the well pleaded allegations of fact in the complaint but only for the purpose of determining the sufficiency of said complaint. However, since it is elementary that defendants' answer admitted nothing unless it did so specifically and since the only material fact alleged in the complaint which defendants' answer admitted was their execution of the written agreement, plaintiffs were bound to prove all other material allegations of their complaint before they were entitled to relief. As said by the master in his report "the pleadings of the defendants place the complainant upon strict proof of virtually all of the fundamental allegations in the amended bill of complaint, except the execution of the agreement." It is the rule under our present chancery practice that

even a "sworn complaint is not evidence for plaintiff and under such a bill he is required to prove all of the material allegations therein contained not admitted by the answer." Neal v. Odle, 308 Ill. 469. "The rule established in this state by repeated decisions is, that one must show that he is ready, able and willing to perform a contract on his part before he is entitled to a decree for specific performance of the contract ***. In a proceeding for specific performance the burden of proof is on the complainant to establish the execution of the contract on which he relies and to show a full and complete performance on his part." Congregation v. Congregation, 300 Ill. 115. Plaintiffs failed completely to prove that they had performed their part of the contract or that they were ready to perform, able to perform or willing to perform the contract on their part.

Even though plaintiffs had presented evidence showing conclusively that defendants had breached the contract by wrongfully failing and refusing to comply with its terms as to payment, still they would not be entitled to a decree for specific performance since they had an adequate remedy at law for compensatory damages. The agreement provided for payment by defendants to plaintiffs of \$25,000 in cash and the transfer of stock subject to repurchase by defendants at an agreed price of \$97,500. Whatever peculiar value, if any, the stock of the United Air Cleaner Corporation might have possessed for plaintiffs if the contract had been fully performed by both parties is no longer material since there was a complete failure of performance. If it could be shown that defendants are liable to plaintiffs for breach of the contract, any damages suffered by the latter can with reasonable certainty be computed in money.

We are unable to agree with the finding of the master that, because the contract provided that defendants were required to perform "at once" certain acts by way of payment, "payments and the acts of the defendants were conditions precedent to the obligation of complainants to transfer to defendants the assets referred to in said agreement." When the language of the agreement "The 'Associates' hereby

agree to sell, assign and transfer to the Beattys *** such Radio and talking machine improvements as are set forth in Patents applied for and fully described therein" is considered with all its other provisions, we think it becomes readily apparent that payment of consideration by defendants was intended to be a condition concurrent with plaintiffs' formal transfer and assignment to defendants of the subject matter of the sale.

Parties who intend to do so may, of course, enter into a contract sufficiently complete to pass title to a device or patent, an application for a patent or a complete patent, but we are impelled to hold that the written agreement of the parties here was not intended to constitute such a contract, that it did not purport to presently convey title to anything, that it did not contain a sufficient description to identify the subject matter of the sale, and that it was not intended by the parties to be complete in itself or to constitute a complete instrument of sale, transfer and assignment.

Other points are urged but in the view we take of this cause we deem further discussion unnecessary.

For the reasons stated herein the decree of the Circuit court should be and it is affirmed.

DECREE AFFIRMED.

Friend and Scanlan, JJ., concur.

agree to sell, assign and transfer to the Plaintiff the such rights and claims machine improvements as are set forth in patents applied for and fully described therein is considered with all the other provisions, we think it necessary to make the following provisions in consideration of defendant's agreement to be a condition precedent with Plaintiff's former transfer and assignment to defendant of the subject matter of the sale.

Further the intent to be so may, of course, enter into a contract sufficiently complete to pass title to a device or patent, an application for a patent or a complete patent, but we are impelled to hold that the written agreement of the parties here was not intended to constitute such a contract, that it did not purport to convey title to anything, that it did not contain a sufficient description to identify the subject matter of the sale, and that it was not intended by the parties to be complete in itself or to constitute a complete instrument of sale, transfer and assignment.

Other points are urged but in the view we take of this

case no more further discussion unnecessary.

For the reasons stated herein the decree of the Circuit

court should be and it is affirmed.

WILLIAM WYLLIE,

Plaintiff and Respondent, vs. Defendant.

40568

DREXEL ICE CREAM CO.,
a corporation

Appellee,

v.

JOSEPH ARMENALI and
JULIUS ARMENALI,
Appellants.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

302 I.A. 430

MR. PRESIDING JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

This action was brought by plaintiff, Drexel Ice Cream Co., to recover from Joseph and Julius Armenali, defendants, the principal amount claimed to be due on a judgment note executed by said defendants. The jury having returned a verdict finding the issues against plaintiff, on the latter's motion a new trial was granted. Defendants' petition for leave to appeal from the order of the trial court granting plaintiff a new trial having been allowed, that order is here for review.

April 17, 1935, defendants purchased from plaintiff for \$700 a soda fountain and other articles to be used in connection therewith, paying therefor \$100 in cash and executing and delivering their chattel mortgage note for \$600 for the balance of the purchase price, together with a chattel mortgage securing same. The note recites on its face that it was due and payable three years after date and it contains the further recital that it "is secured by a chattel mortgage of even date herewith." The chattel mortgage describes the chattel mortgage note as being of "even date herewith in the amount of six hundred dollars payable three years from date," and immediately thereafter provides:

"Said chattel mortgage note to be paid at the rate of ten cents per gallon on all ice cream purchased from the mortgagee and in the event said mortgagors shall discontinue or refuse to purchase all of the ice cream used in the operation of said business at 4400 Milwaukee Avenue, Chicago, Illinois, all of the indebtedness [principal] *** shall at the option of the mortgagee become at once

OFFICE OF THE CLERK OF THE COURT
OF CHICAGO

3021A.480

THE CHICAGO ICE CREAM CO.,
A CORPORATION
JULIUS ARMANI and
JOSEPH ARMANI
Defendants

MR. PRESIDING JUSTICE BURMAN DELIVERED THE OPINION OF THE COURT.

This action was brought by plaintiff, Chicago Ice Cream

Co., to recover from Joseph and Julius Armani, defendants, the

principal amount claimed to be due on a judgment note executed by

said defendants. The jury having returned a verdict finding the

issues against plaintiff, on the latter's motion a new trial was

granted. Defendants' petition for leave to appeal from the order

of the trial court granting plaintiff a new trial having been

affirmed, that order is now for review.

April 17, 1935, defendants purchased from plaintiff for

\$700 a soda fountain and other articles to be used in connection

therewith, paying therefor \$100 in cash and executing and delivering

their chattel mortgage note for \$600 for the balance of the purchase

price, together with a chattel mortgage securing same. The note

recited on its face that it was due and payable three years after

date and it contains the further recital that it "is secured by

a chattel mortgage of even date herewith." The chattel mortgage

describes the chattel mortgage note as being of "even date herewith

in the amount of six hundred dollars payable three years from date,"

and immediately thereafter provides:

"said chattel mortgage note to be paid at the rate of

ten cents per gallon on all the cream produced from the mortgage
and on the cream and sugar sold in connection with the business
of the ice cream used in the operation of said business
at 400 Milwaukee Avenue, Chicago, Illinois, all of the indebtedness
[plaintiff] shall at the option of the mortgagee become at once

due and payable and the mortgagee shall have immediate right to take possession of the property and proceed according to the Statute made and provided to acquire title thereof."

On August 10, 1938, plaintiff confessed judgment on the note for \$692.50, which included the full amount of the principal and \$92.50 attorney's fees. The note did not call for payment of interest. On August 17, 1938, plaintiff foreclosed the chattel mortgage and the mortgaged property was sold August 20, 1938, for \$511, of which amount the balance remaining after the costs and expense of the foreclosure and sale had been deducted, was credited on the judgment.

On September 30, 1938, defendants filed the following petition to vacate the judgment and for leave to appear and defend:

"Your petitioners, JOSEPH ARMENALI and JULIUS ARMENALI, respectfully represent unto the Court that they are the defendants in the above entitled cause.

"That on to-wit: September 28, 1938, they were served with a writ of execution issued out of this Court under date of August 16, 1938 by a deputy bailiff of the Municipal Court and that a levy was made on the personal property of these defendants at the time of the service of said execution.

"Your petitioners further respectfully represent that the first knowledge that they had of the judgment herein was on September 28, 1938, the date of the service of said writ of execution, and that they immediately engaged counsel to present this petition for the purpose of opening up, vacating or satisfying said judgment.

"That these defendants have a good defense to the whole of the plaintiff's judgment, and that said defense is as follows:

"On or about April 17, 1935 defendants being then engaged in the ice cream parlor and restaurant business at 4400 Milwaukee Avenue, Chicago, Illinois, purchased a fountain and salad unit from the plaintiffs at the price of \$700. The defendants paid \$100 in cash and executed and delivered a chattel mortgage and note for the sum of \$600. Said note recites on its face that it was due and payable three years from date, but likewise recites that it is secured by chattel mortgage on personal property in Chicago, Illinois, thereby making said chattel mortgage note subject to the terms and conditions of said chattel mortgage. That in and by the terms of said chattel mortgage, the defendants were required to pay said note 'at the rate of ten cents per gallon on all ice cream purchased from the mortgagee and in the event said mortgagors shall discontinue or refuse to purchase all of the ice cream used in the operation of said business at 4400 Milwaukee Avenue, Chicago, Illinois, all of the indebtedness shall at the option of the mortgagee become due and payable and the mortgagee shall have immediate right to take possession of the property and proceeds, according to the statute made and provided to acquire title thereof.'

"That the defendants, pursuant to the terms of said chattel mortgage, did purchase from the plaintiff all ice cream used in the

and the parties and the mortgage shall have immediate right to the possession of the property and proceed according to the Statute made and provided to secure this title thereof."

On August 12, 1938, Plaintiff confessed judgment on the note for \$692.50, which included the full amount of the principal and \$92.50 attorney's fees. The note did not call for payment of interest. On August 17, 1938, Plaintiff foreclosed the chattel mortgage and the mortgaged property was sold August 20, 1938, for \$711, of which amount the balance remaining after the costs and expense of the foreclosure and sale had been deducted, was credited on the judgment.

On September 30, 1938, defendants filed the following petition to vacate the judgment and for leave to appear and defend:

"Your petitioners, JOSEPH ARNHEIM and JULIUS ARNHEIM, respectfully represent unto the Court that they are the defendants in the above entitled cause.

"That on or about September 26, 1938, they were served with a writ of execution issued out of this Court under date of August 12, 1938 by a deputy bailiff of the Municipal Court and that a levy was made on the personal property of these defendants at the time of the service of said execution.

"Your petitioners further respectfully represent that the first knowledge that they had of the judgment herein was on September 28, 1938, the date of the service of said writ of execution, and that they immediately engaged counsel to present this petition for the purpose of opening up, vacating or setting aside said judgment.

"That these defendants have a good defense to the writ of the Plaintiff's judgment, and that said defense is as follows:

"On or about April 14, 1938 defendants being then engaged in the ice cream parlor and restaurant business at 4400 Milwaukee Avenue, Chicago, Illinois, purchased a fountain and sales unit from the Plaintiff at the price of \$700. The defendants paid \$100 in cash and executed a chattel mortgage and note for the sum of \$600. Said note matured on the 1st day of May 1938 and was due and payable three years from date, but interest was to be paid monthly by chattel mortgage on personal property in Chicago, Illinois, thereby making said chattel mortgage more subject to the terms and conditions of said chattel mortgage. That in and by the terms of said chattel mortgage, the defendants were required to pay said note at the rate of two cents per dollar on all the cream purchased from the mortgagee and in the event said mortgagee shall discontinue or refuse to purchase all of the ice cream used in the operation of said business at 4400 Milwaukee Avenue, Chicago, Illinois, all of the defendants shall at the option of the mortgagee between the said parties and the mortgagee shall have immediate right to the possession of the property and proceed according to the Statute made and provided to secure this title thereof."

"That the Plaintiff, pursuant to the terms of said chattel mortgage, did purchase from the Plaintiff all the cream used in the

operation of their said business and to pay said note at the rate of ten cents per gallon and continued to do so up to August 17, 1938. That on that date, notwithstanding the fact that these defendants continued to fully and faithfully perform all of the covenants and conditions required of them by said chattel mortgages, plaintiff herein commenced foreclosure proceedings to be instituted on said chattel mortgage, and that on August 20, 1938, plaintiff caused the personal property described in said chattel mortgage to be sold at a chattel mortgage sale and that the plaintiff purchased said personal property at said sale for the sum of \$511.

"That on, to-wit: August 17, 1938, the date of the institution of said foreclosure proceedings, there was due from these defendants to the plaintiff on said note and chattel mortgage, the sum of \$510, which amount these defendants were at all times ready, able and willing to pay according to the terms and conditions of said note and chattel mortgage, and that said plaintiff did not at any time prior to the institution of the foreclosure proceeding demand or ask for payment of said note and chattel mortgage in any other manner or otherwise than as provided in said chattel mortgage.

"That by reason of the fact that said chattel mortgage note was not due at the time of the entry of the judgment herein and by reason of the further fact that the unpaid indebtedness evidenced and secured by said note and chattel mortgage was fully satisfied by the sale of the personal property described in said chattel mortgage note for an amount equal to the said unpaid indebtedness, the judgment entered herein is a nullity and should be vacated, set aside and held for naught, or should be satisfied of record."

In response to defendants' petition they were allowed to appear and defend, the judgment to stand as security.

The note and chattel mortgage were executed at the same time and as part of the same transaction and "the rule is familiar when different instruments are executed as the evidence of one transaction or agreement, they are to be read and construed as constituting a single instrument." Hagerman v. Schulte, 349 Ill. 11. "The authorities are all to the effect that where contemporaneous agreements are entered into pertaining to the same subject matter, they have to be construed together and this principle applies to notes as well as to any other contract." Jefferson Trust & Savings Bank v. Heller & Sons, 296 Ill. App. 447. Since the chattel mortgage was an intrinsic part of the transaction it was admissible in evidence. While the note provides for payment of the full amount of the principal thereof three years after date and the chattel mortgage, reference to which is made in the note contains a similar provision, the mortgage then proceeds to provide that "said chattel mortgage note be paid at the rate of 10¢ per gallon on all ice cream purchased from the plaintiff." Thus two inconsistent

operation of their said business and to pay said note at the rate of ten cents per gallon and continuing as so up to August 17, 1938. That on that date, notwithstanding the fact that these defendants continued to fully and faithfully perform all of the covenants and conditions required of them by said chattel mortgage, plaintiff herein commenced foreclosure proceedings to be instituted on said chattel mortgage, and that on August 20, 1938, plaintiff caused the personal property described in said chattel mortgage to be sold at a public auction sale and the proceeds received said personal property at said sale for the sum of \$111.

"That on, to-wit August 17, 1938, the date of the institution of said foreclosure proceedings, there was then in existence no amount then outstanding on said note and chattel mortgage, the sum of \$111, which amount these defendants were at all times ready, able and willing to pay according to the terms and conditions of said note and chattel mortgage, and that said plaintiff did not at any time prior to the institution of the foreclosure proceedings demand or ask for payment of said note and chattel mortgage in any other manner or otherwise than as provided in said chattel mortgage.

"That by reason of the fact that said chattel mortgage note was not due at the time of the entry of the judgment herein and by reason of the further fact that the unpaid indebtedness evidenced and secured by said note and chattel mortgage was fully satisfied by the sale of the personal property described in said chattel mortgage note for an amount equal to the said unpaid indebtedness, the judgment entered herein is a nullity and should be vacated, set aside and held for nemo, or should be set aside or rescinded."

In response to defendants' petition they were allowed to appear and defend, the judgment to stand as security.

The note and chattel mortgage were executed at the same time

and as part of the same transaction and "the rule is familiar when different instruments are executed as the evidence of one transaction or agreement, they are to be read and construed as constituting a single instrument." Waxman v. Schmitt, 949 Ill. 11. "The authorities are

all to the effect that where contemporaneous agreements are entered into pertaining to the same subject matter, they have to be construed together and this principle applies to notes as well as to any other contract." Johnson v. ..., 948 Ill. 11. "Where the chattel mortgage was an integral part of the transaction it was enforceable in toto." While the note provided for payment of the full amount of the principal thereof three years after date and the chattel mortgage, reference to which is made in the note contains a similar provision, the mortgage then proceeds to provide that "said chattel mortgage note be paid at the rate of 10¢ per gallon on all raw cotton purchased from the plaintiff." These two inconsistent

moderate of payment are indicated.

Defendants purchased from plaintiff all the ice cream used in the operation of their business from the date of the purchase of the soda fountain and continued to do so even after the judgment was entered and until a short time prior to the foreclosure of the mortgage. It was testified on behalf of defendants that they paid \$90 on the principal amount of the note at the rate of 10¢ a gallon on 900 gallons of ice cream purchased by them from plaintiff during the period heretofore referred to. It is conceded in plaintiff's brief that \$70 was so paid.

The real question presented upon the trial of this cause was the proper construction to be given to the provisions of the note and chattel mortgage as to the time and method of payment of said note. We think the court was clearly in error in submitting the construction of such documents to the jury. The interpretation of the agreement of the parties as to the method and manner of payment of the note was a matter of law for the court and not a question of fact for the jury. Where the terms of a written contract are ambiguous, even though resort is had to the circumstances surrounding the parties at and immediately prior to the time of its execution or to evidence of its practical performance as an aid to the ascertainment of the intention of the parties, the function of interpretation rests exclusively with the court, unless the facts and circumstances surrounding the execution of such contract or concerning its practical construction are controverted. It is only when such facts are controverted that the question as to what the contract was or as to what the parties intended is a mixed question of law and fact to be submitted to the jury. (Carstens Packing Company v. Sterne & Son Co., 286 Ill. 356.) In this case since there was no conflict in any evidence introduced that might aid in determining the meaning and intention of the parties, we repeat that the construction of the note and chattel mortgage presented a question of law for the court and that it was improper to submit same to the jury.

mode of payment are indicated.

Defendants purchased from plaintiff all the ice cream used in the operation of their business from the date of the purchase of the note and continued to do so until the judgment was entered and until a short time prior to the foreclosure of the mortgage. It was testified on behalf of defendants that they paid \$90 on the principal amount of the note at the rate of 10¢ a gallon on 900 gallons of ice cream purchased by them from plaintiff during the period. Therefore referred to. It is conceded in plaintiff's brief that \$70 was so paid.

The real question presented upon the trial of this cause was the proper construction to be given to the provisions of the note and chattel mortgage as to the time and method of payment of said note. We think the court was clearly in error in admitting the construction of said documents to the jury. The interpretation of the agreement of the parties as to the method and manner of payment of the note was a matter of law for the court and not a question of fact for the jury. Where the terms of a written contract are ambiguous, even though there is no evidence of the intention of the parties at and immediately prior to the time of its execution or to evidence of its practical performance as an aid to the ascertainment of the intention of the parties, the function of interpretation rests exclusively with the court, unless the facts and circumstances surrounding the execution or non-execution of the contract are such as to make the question one of fact. It is only when such facts are controverted that the question as to what the contract was or as to what parties intended is a mixed question of law and fact to be submitted to the jury. (Carpenter v. The City of New York, 100 N.Y. 356.) In this case since there was no conflict in any evidence introduced that might aid in determining the meaning and intention of the parties, we repeat that the construction of the note and chattel mortgage presented a question of law for the court and that it was improper to submit same to the jury.

We do not feel that it is necessary to discuss the claimed inaccuracies in instructions since upon a retrial they are not likely to recur.

Since the sole question presented for our determination is the propriety of the order allowing plaintiff a new trial, we are not called upon to interpret the documents involved.

Not only did the trial court not abuse its discretion in allowing the new trial but plaintiff was clearly entitled thereto for the reasons indicated. The order of the trial court allowing plaintiff a new trial is affirmed.

ORDER AFFIRMED.

Friend and Scanlan, JJ., concur.

We do not feel that it is necessary to discuss the alleged
inaccuracies in instructions since upon a retrial they are not
likely to recur.
It is true that the trial was interrupted for the defendant's
the propriety of the order allowing plaintiff's new trial, we are not
called upon to interpret the documents involved.
Not only did the trial court not abuse its discretion in
allowing the new trial but plaintiff was clearly entitled thereto
for the reasons indicated. The order of the trial court allowing
plaintiff a new trial is affirmed.

ORDER AFFIRMED.

WILLIAM H. HENNING, JR., JUDGE.

39722

VICTOR G. NARDI, not individually
but as successor in trust to UNION
BANK OF CHICAGO as trustee, under
trust agreement dated April 1, 1927,
and known as trust No. 1904,
Appellant,

v.

LOUIS SCHELFHOUT and MARY SCHELFHOUT,
Appellees.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

302 I.A. 431

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Victor G. Nardi, as successor in trust to Union Bank of Chicago, trustee, brought suit against Louis Schelfhout and Mary, his wife, to collect \$2,200, being the balance due on a written contract for the sale of real estate in Cook county. Defendants filed a counterclaim based on fraud and deceit, seeking to recover the \$4,500 theretofore paid on the contract. Trial was had by jury resulting in a verdict and judgment for defendants of \$350. Plaintiff appeals.

The property purchased by defendants consisted of six vacant lots in Tessville, Cook county, Illinois. The purchase price was \$6,750. When the agreement was executed defendants paid on account \$1,500 in cash, and thereafter for 42 months made monthly instalment payments until July, 1932, at which time the aggregate amount paid by them approximated \$4,500. When suit was instituted by plaintiff to recover the unpaid balance, with interest, of \$2,200, defendants interposed a set-off or counterclaim alleging that certain false and fraudulent representations had been made to them by plaintiff's agents when the lots were purchased, and seeking recovery of \$4,500 theretofore paid by them.

Numerous questions are raised and discussed in the briefs of the respective parties, but the controlling issue involved relates to the false and fraudulent misrepresentations alleged to have been

Victor G. Nardi, as successor in trust to Union Bank of Chicago, trustee, brought suit against Louis Nebelhoff and Mary, his wife, to collect \$2,200, being the balance due on a written contract for the sale of real estate in Cook county. Defendants filed a counterclaim based on a loan made by them to the plaintiff, the \$2,200 being the balance due on the contract. Trial was had by jury resulting in a verdict and judgment for defendants of \$220. Affirmance.

LOUIS NEBELHOFF and MARY NEBELHOFF, Appellees.

APPEAL FROM
CIRCUIT COURT
OF CHICAGO.

302 I.A. 481

BY JUSTICE FRANK ELLIOTT, THE CHIEF OF THE COURT.

Victor G. Nardi, as successor in trust to Union Bank of

Chicago, trustee, brought suit against Louis Nebelhoff and Mary,

his wife, to collect \$2,200, being the balance due on a written

contract for the sale of real estate in Cook county. Defendants

filed a counterclaim based on a loan made by them to the plaintiff,

the \$2,200 being the balance due on the contract. Trial was had by jury

resulting in a verdict and judgment for defendants of \$220. Affirmance.

affirmance.

The property purchased by defendants consisted of six

vacant lots in Deseronto, Cook county, Illinois. The purchase

price was \$6,750. When the agreement was executed defendants

paid on account \$1,500 in cash, and thereafter for 42 months made

monthly installment payments until July, 1932, at which time the

aggregate amount paid by them approximated \$4,500. When suit was

instituted by plaintiff to recover the unpaid balance, with

interest, of \$1,200, defendants interposed a set-off or counterclaim

alleging that certain false and fraudulent representations had been

made to them by plaintiff's agents when the lots were purchased, and

seeking recovery of \$4,500 interest paid by them.

Various questions were raised and discussed in the briefs

of the respective parties, but the controlling issue involved related

to the false and fraudulent representations alleged to have been

made by plaintiff's agents in inducing defendants to purchase the lots in question. These representations may be briefly summarized as follows: (1) that elevated railroad lines were to be constructed and in operation in the vicinity of these lots within one year; (2) that the owner of the subdivision was going to erect at least three buildings in the vicinity of the property purchased; and (3) that a contract had been entered into with a railroad company to extend railroad transportation close to the vacant property. Neither of the parties discuss the evidence adduced upon the hearing, but rather confine themselves to the argument of legal propositions which are fairly well established. Nevertheless, we have carefully examined the abstract of record to ascertain whether the charge that false and fraudulent misrepresentations were made as an inducement to the purchase of this property, and have concluded that although defendants' witnesses testified to conversations had with plaintiff's agents, wherein they discussed the future advantages that would arise from increased transportation facilities and construction work that would probably result in the future, there is no evidence to sustain the contention that any representations that may have been made were knowingly false or fraudulent. The gist of defendants' claim is fraud in the inducement, and the authorities are consistently in accord that in order to recover in an action of this kind the parties asserting fraud must allege and prove by clear and convincing evidence (1) misrepresentations of material facts; (2) made for the purpose of inducing the purchaser to act; (3) which were in fact untrue, and known to be such by the party making it; (4) that the party asserting fraud relied upon the misrepresentations; and (5) and acted upon them to his damage. (Bouxsein v. First Nat. Bank, 292 Ill. 500; Krankowski v. Knapp, 268 Ill. 183; Prout v. Hoy Oil Co., 263 Ill. 54.)

No doubt certain conversations were had between plaintiff's agent and defendants with reference to the future enhancement of this property, and not only plaintiff's agents but others undoubtedly believed that during the existing period of prosperity, when these

made by plaintiff's agents in making contracts to purchase the lots in question. These representations may be briefly summarized as follows: (1) that elevated railroad lines were to be constructed and in operation in the vicinity of these lots within ten years; (2) that the owner of the subdivision was going to erect at least three buildings in the vicinity of the property purchased; and (3) that a contract had been entered into with a railroad company to extend railroad transportation close to the vacant property. Neither of the parties disputes the evidence which shows that these representations confine themselves to the argument of legal propositions which are fairly well established. Nevertheless, we have carefully examined the abstract of record to ascertain whether the charges that false and fraudulent representations were made as an inducement to the purchase of this property, and have concluded that although defendants' witnesses testified to conversations had with plaintiff's agents wherein they discussed the future advantages that would arise from increased transportation facilities and construction work that would probably result in the future, there is no evidence to sustain the contention that any representations that may have been made were knowingly false or fraudulent. The gist of defendants' claim is fraud in the inducement, and the authorities are consistently in accord that in order to recover in an action of this kind the parties asserting fraud must allege and prove by clear and convincing evidence (1) misrepresentation of material facts; (2) that the parties inducing the purchaser to act; (3) which were in fact untrue, and known to be such by the party making it; (4) that the party asserting fraud relied upon the misrepresentations; and (5) and acted upon them to his damage. (*Boness v. West End Bank*, 232 Ill. 300; *Frank v. State*, 233 Ill. 183; *Frank v. New Oil Co.*, 263 Ill. 54.) No doubt certain conversations were had between plaintiff's agent and defendants with reference to the future enhancement of this property, and not only plaintiff's agents but others undoubtedly believed that during the existing period of prosperity, when these

lots were purchased, the elevated and railroad lines would extend their facilities to that section of the county, and that a building boom would result which would materially increase the value of these lots; but defendants failed to prove a very material element of their case, namely, that these representations, if and when made, were either false or fraudulent. It may well be that when the subject matter of the future of these lots was discussed between the parties, certain well defined plans for enhancing the value of property in that vicinity through the extension of railroad facilities and the erection of buildings may have been contemplated; but the subsequent collapse in real estate and other securities undoubtedly affected this property as well as other subdivisions in all parts of the county, and without proof of the alleged falsity of these statements, or scienter thereof, defendants cannot recover on their counterclaim.

It is a significant circumstance that for some forty-two months defendants regularly paid their installments under this contract. They resided only about one and a half miles from the property, which indicates that they were in a position to know during this long period of time whether any of the alleged promises were being fulfilled; nevertheless, they continued for this long period of time to make their payments and asserted no legal claim for recovery of the amount paid by them until suit was instituted by the successor trustee to recover the balance due on their contract.

We are unable to ascertain how the jury arrived at a verdict of \$350, but it is apparent from an analysis of the evidence that defendants failed to prove their counterclaim under the well established rules applicable to actions for false representations. Neither the pleadings nor the proofs indicate by whom the lines were to be constructed, and it may well be that the elevated company or someone else may have indicated an intention to do the very thing which is now alleged to have been falsely represented to defendants. Although there is some evidence adduced by defendants that plaintiff's agent discussed the owner's intention to erect at least three buildings

lots were purchased, the elevated and railroad lines would extend their facilities to that section of the county, and that a building boom would result which would materially increase the value of these lots; but defendants failed to prove a very material element of their case, namely, that these representations, if and when made, were either false or fraudulent. It may well be that when the subject matter of the future of these lots was discussed between the parties, certain well defined plans for enhancing the value of property in that vicinity through the extension of railroad facilities and the erection of buildings may have been contemplated; but the subsequent collapse in real estate and other securities undoubtedly affected this property as well as other subdivisions in all parts of the county, and without proof on the alleged truth of these statements, or whether the defendants cannot recover on their contract.

It is a significant circumstance that for some forty-two months defendants regularly paid their installments under this contract. They resided only about one and a half miles from the property, which indicates that they were in a position to know during this long period of time whether any of the alleged promises were being fulfilled; nevertheless, they continued for this long period of time to make their payments and asserted no legal claim for recovery of the amount paid by them until suit was instituted by the successor trustee to recover the balance due on their contract.

We are unable to ascertain how the jury arrived at a verdict of \$350, but it is apparent from an analysis of the evidence that defendants failed to prove their counterclaim under the well established rules applicable to actions for false representations. Neither the pleadings nor the proofs indicate by whom the lines were to be constructed, and it may well be that the elevated company or some other party have indicated an intention to do the very thing which is now alleged to have been falsely represented as imminent. Although there is some evidence showing that plaintiffs' agent discussed the company's intention to erect at least three buildings

in the vicinity of these lots, there is no proof that the statement of the intention by the owner was untrue. Likewise, defendants' witnesses testified that plaintiff's agent had represented the existence of a contract entered into by the railroad company to extend transportation facilities close to the vacant property; but there is no proof that such a contract did not exist at the time, or any evidence whatsoever to the contrary.

Defendants also introduced evidence as to the value of these lots at the time of the purchase, and it is argued that the purchase price fixed in the contract was grossly excessive. The record clearly shows that before the property was purchased defendants discussed the matter at length with plaintiff's agents, had ample opportunity to determine its value, and after making payments under the contract for forty-two months they are not in position to claim the excessiveness of the purchase price.

Other questions of law are raised as ground for reversal, among them being the contention that a suit at law cannot be maintained against a trustee in his representative capacity, and that defendants' counterclaim should have been the subject of an equitable proceeding rather than an action at law. Defendants' answer to these contentions is that under the rules and practice of the Municipal court defendants have a right to interpose any equitable defense that they may have against the enforcement of a contract to recover money. We deem it unnecessary to pass on these various contentions, because ^{we} are impelled to hold that the verdict of the jury was manifestly against the weight of the evidence so far as defendants' counterclaim is concerned, and therefore the cause will have to be retried.

The recent case of Bundesen v. Lewis, 368 Ill. 623, presented similar questions. It was there held that reliance on a representation which proves to be untrue that a state hard road will, when finally located and completed, bound on one side the property involved in the contract of purchase, is not ground for cancellation of the contract, where the purchaser, being a man of experience, knew or should have

in the vicinity of the land, there is no proof that the defendant of the intention by the owner was untrue. Likewise, defendant's witnesses testified that plaintiff's agent had represented the existence of a contract entered into by the railroad company to extend transportation facilities close to the vacant property; but there is no proof that such a contract did not exist at the time, or any evidence whatever is in the country.

Defendants also introduced evidence as to the value of the land at the time of the purchase, and it is evident that the price fixed in the contract was grossly excessive. The record clearly shows that before the property was purchased defendants intended to matter at length with plaintiff's agents, had ample opportunity to determine its value, and after making payments under the contract for forty-two months they are not in position to claim the excessiveness of the purchase price.

Other questions of law are raised as grounds for reversal, among them being the contention that a suit at law cannot be maintained against a trustee in his representative capacity, and that defendants' counterclaim should have been the subject of an equitable proceeding rather than an action at law. Defendants' answer to these contentions is that under the rules and practice of the municipal court defendants have a right to interpose any equitable defense that they may have against the enforcement of a contract to recover money. We deem it unnecessary to pass on these various contentions, because ^{we} are inclined to hold that the verdict of the jury was manifestly against the weight of the evidence so far as defendants' counterclaim is concerned, and therefore the cause will have to be retried.

The recent case of Wheeler v. Lewis, 108 Ill. 623, presented similar questions. It was there held that reliance on a representation made by an agent is a valid defense when the property involved in the contract of purchase is not known for consideration of the contract, the purchaser being a man of experience, know or should have

known what inquiry to make to ascertain the truth of the representation, nor is he entitled to rely on the representation that a certain street extended beyond the property, where he viewed the premises and thereafter continued payments under the contract and took over the interest of a copurchaser. Although it is true that in the case at bar defendants were not persons of as wide experience as plaintiff in the Bundesen case, they were in much closer proximity to the property and had every opportunity to view the premises frequently and also to make inquiry as to the probable truth of the representations which they claimed.

Because of what we have said the judgment of the Municipal court is reversed and the cause remanded for another trial.

JUDGMENT REVERSED AND CAUSE REMANDED.

Sullivan, P. J., and Scanlan, J., concur.

known what inquiry to make to ascertain the truth of the representation, nor is he entitled to rely on the representation that a certain street -
after continued payments under the contract and took over the interest of a co-venturer. Although it is true that in the case at bar defendant was not persons of as wide experience as plaintiff in the business case, they were in much closer proximity to the property and had every opportunity to view the premises frequently and also to make inquiry as to the probable truth of the representations which they claimed. Because of what we have said the judgment of the Municipal Court is reversed and the cause remanded for another trial.

REVEREND JUSTICE OF THE PEACE

WILLIAM J. J. AND SCOTT J. J. COURT.

40590

EDWIN B. HARTS, as trustee under
the last will of P. W. HARTS,
deceased,

Appellant,

v.

WILLIAM P. CRONIN et al.,
Appellees.

APPEAL FROM SUPERIOR
COURT OF COOK COUNTY.

302 I.A. 431²

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Edwin B. Harts as trustee under the last will of P. W. Harts, deceased, appeals from a decree of the Superior court overruling exceptions to the report of the master in chancery to whom the cause had been referred and dismissing the complaint for want of equity.

There is substantially no dispute as to the essential facts which disclose that in May, 1927, William P. Cronin and Henry B. Cushing purchased 128 lots in the vicinity of 91st street and Central avenue, Cook County, Illinois, from Ernest A. Anderson, who at their direction conveyed title to the Mutual National Bank of Chicago as trustee by deed in trust dated May 7, 1927, which contained the following provision: "The interest of each and every beneficiary hereunder and of all persons claiming under them or any of them shall be only in the earnings, avails and proceeds arising from the sale or other disposition of said real estate, and such interest is hereby declared to be personal property, and no beneficiary hereunder shall have any title or interest, legal or equitable, in or to said real estate as such, but only an interest in the earnings, avails and proceeds thereof as aforesaid." By this trust agreement, designated as No. 129, Cronin and Cushing were designated as beneficiaries in equal shares. The conveyance to the bank as trustee was subject to two trust deeds, the first of which

10000

WILLIAM F. CROONIN, JR.,
Plaintiff,
vs.
THE FIRST NATIONAL BANK OF CHICAGO,
Defendant.

FILED FOR RECORD
COUNT OF COOK COUNTY

3021A.481

MR. JUSTICE PHILIP DELIVERED THE OPINION OF THE COURT.

William F. Croonin, Jr., who was appointed executor of the last will of J. B. Croonin, deceased, appeals from a decree of the Superior Court overruling exceptions to the report of the master in equity of said court and from a decree of the same court affirming the findings of fact and conclusions of law of the master.

There is substantially no dispute as to the essential facts which disclose that in May, 1927, William F. Croonin and

Henry B. Cushing purchased 128 lots in the vicinity of 91st street and Central Avenue, Cook County, Illinois, from James A. Croonin, who at their direction conveyed title to the United National Bank of Chicago as trustee by deed in trust dated May 7, 1927, which contained the following provisions: "The interest of each and every beneficiary hereunder and of all persons claiming under them on any of them shall be only in the principal, profits and proceeds arising from the sale or other disposition of said real estate, and such interest as hereby declared to be personal property, and no beneficiary hereunder shall have any right or interest, legal or equitable, in or to said real estate as such, but only an interest in the earnings, profits and proceeds thereof as aforesaid." By this trust agreement, designated as No. 127, Croonin and Cushing were designated as beneficiaries in equal shares. The conveyance to the bank as trustee was subject to two trust deeds, the first of which

securing \$12,000 was dated April 5, 1926, and was owned by defendant J. S. Cook, who had formerly owned the subdivision and had taken the mortgage as part of the purchase price when he sold the property. Cook, who was designated as trustee in the \$12,000 mortgage trust deed, received payments on the \$12,000 note as the subdivision lots were sold and issued partial releases from time to time so that by February, 1933, the mortgage had been reduced to \$5,800. By May, 1934, there had been default in the payment of taxes for 1931 and 1933, and accordingly Cronin and Cushing, beneficiaries in the trust, advised Cook of their inability to make any further payments. Thereupon Cook agreed with Cronin and Cushing that in order to save himself the trouble and expense of foreclosing he would pay them \$150 each for their interest in the trust and cancel the mortgage indebtedness. Pursuant to this agreement Cronin and Cushing assigned to Cook their respective interests in the trust on May 21, 1934, and Cook in turn executed a release of the trust deed. Thereafter Cook issued his check of \$350 for payment of accrued taxes against the premises. July 29, 1936, more than two years having elapsed since the consummation of the foregoing transaction, plaintiff filed his complaint alleging that Cronin's interest in the trust created in May, 1927, was in fraud of plaintiff as a creditor of Cronin and seeking to have the same set aside. The complaint was based on a judgment recovered by plaintiff on December 22, 1933, against Cronin in the Municipal court of Chicago for \$999, upon which an execution had issued December 28, 1933, and was returned by the bailiff "no part satisfied". It appears from the record that when Cook took over the property to avoid the necessity of foreclosing his first mortgage, he had no knowledge of plaintiff's judgment against Cronin, and that Cook was in fact an innocent purchaser for value.

Complaint is made at the outset that the court erred in admitting evidence to contradict the stipulation of the parties with reference to the location of the property, it being contended that under this stipulation the subdivision in question at Central avenue

... 12,000 was dated April 2, 1936, and was owned by defendant
T. S. Cook, who had formerly owned the subdivision and had taken the
... as part of the purchase price when he sold the property.
Cook, who was designated as trustee in the 12,000 mortgage trust
deed, received payments on the 12,000 note as the subdivision lots
were sold and issued partial releases from time to time so that by
February, 1937, the mortgage had been reduced to \$2,500. By May,
1934, there had been default in the payment of taxes for 1931 and 1932,
and accordingly Cronin and O'Connell, beneficiaries in the trust, advised
Cook of their inability to make any further payments. Thereupon Cook
agreed with Cronin and O'Connell that in order to save himself the trouble
and expense of foreclosing he would pay them \$150 each for their
interest in the trust and cancel the mortgage indebtedness, pursuant
to this agreement Cronin and O'Connell assigned to Cook their respective
interests in the trust on May 12, 1934, and Cook in turn executed a
release of the trust deed. Thereafter Cook issued his check of \$150
for payment of interest due against the mortgage, July 15, 1934,
more than two years having elapsed since the completion of the fore-
closing transaction, plaintiff filed his complaint alleging that Cronin's
interest in the trust created in May, 1934, was in favor of plaintiff
as a creditor of Cronin and seeking to have the same set aside. The
complaint was based on a judgment recovered by plaintiff on December
22, 1933, against Cronin in the Municipal Court of Chicago for \$999,
upon which an execution had issued December 22, 1933, and was returned
by the sheriff "no goods collected". It appears from the record that
when Cook took over the property to stock the market or foreclosing
his first mortgage, he had no knowledge of plaintiff's judgment
against Cronin, and that Cook was in fact an innocent purchaser for
value.

Complaint is made in the record that the same error in
admitting evidence to contradict the stipulation of the parties with
reference to the location of the property, it being contended that
under this stipulation the subdivision in question at Central Avenue

and 91st street was admitted to be within the city of Chicago. From an examination of the stipulation, however, it appears that it does not state where the property was located, but refers only to the description in the third amended complaint. In one of the exhibits attached to the stipulation, however, containing a copy of trust deed No. 129, the property was described as "in the City of Chicago." After proofs were closed before the master defendants counsel discovered for the first time that the parties and their attorneys had evidently been misled as to the location of the property, and presented a petition to the master to reopen proofs and permit evidence to be introduced on the question. The master allowed the petition over plaintiff's objection that the evidence was incompetent, immaterial and contradicted the stipulation, but offered no evidence tending to prove that the property is located in Chicago. Plaintiff attaches significance to this adverse ruling on the part of the master and court, because as he contends if the property were located in Chicago his judgment would have been a lien thereon. It was not an unusual proceeding, however, for the master upon discovering that all the parties had been mistaken as to the location of the property to reopen the proofs and admit evidence correctly fixing the location of the lots, which were undoubtedly without the city limits. Moreover, the contention that the admission of this evidence deprived plaintiff of a lien which he ^{was} led to believe that he had upon the premises in question is not borne out by the record, for plaintiff does not allege anywhere in his amended complaint that he had a lien, and if he thought that he had one he would not have been required to resort to a court of equity for relief.

As one of the principal reasons for reversal plaintiff invokes the rule of law that a conveyance of property by a grantor, in which he reserves a beneficial interest to himself, is void, as to creditors, both existing and subsequent, whether the grantor intended fraud or not, and from this premise it is argued that defendant Cook in purchasing

and that street was admitted to be within the city of Chicago.
From an examination of the stipulation, however, it appears that
it does not state where the property was located, but refers only
to the description in the third amended complaint. In one of the
exhibits attached to the stipulation, however, containing a copy
of trust deed No. 129, the property was described as "in the City
of Chicago." After proofs were taken before the master deponent
concerned discovered for the first time that the parties and their
attorneys had evidently been misled as to the location of the
property, and presented a petition to the master to reopen proofs
and permit evidence to be introduced on the question. The master
allowed the petition over plaintiff's objection that the evidence
was incompetent, immaterial and contradicted the stipulation, but
offered no evidence tending to prove that the property is located
in Chicago. Plaintiff attaches significance to this adverse ruling
on the part of the master and court, because as he contends if the
property were located in Chicago his judgment would have been a lien
thereon. It was not an unusual proceeding, however, for the master
upon discovering that all the parties had been mistaken as to the
location of the property to reopen the proofs and admit evidence
concerning fixing the location of the lots, which were undoubtedly
within the city limits. Moreover, the contention that the
admission of this evidence deprived plaintiff of a lien which he
was to believe that he had upon the premises in question is not borne out
by the record, for plaintiff does not allege anywhere in his amended
complaint that he had a lien, and if he thought that he had one he
could not have been required to resort to a court of equity for
relief.

As one of the principal reasons for reversal plaintiff invokes
the rule of law that a conveyance of property by a grantor, in which he
retains a beneficial interest to himself, is void, as to creditors,
both existing and subsequent, whether the grantor intended to do so
or not, and from this position it is argued that plaintiff took in purchasing

the beneficial interest from Cronin was bound to know that the trust might have been created to defraud Cronin's creditors, and that Cook had constructive notice from the mere fact that he was purchasing an interest in a trust which he alleges as having been made to defraud creditors. The deed in question, however, clearly defines the mutual rights and interests of the parties thereto, and therefore negatives any element of secret reservations. In this respect the case at bar differs from many of the decisions cited by plaintiff, where debtors for reasons best known to themselves conveyed title by deeds absolute on their face, making no reservations of benefit to the grantor. Those cases cannot be held to involve the rights of innocent purchasers for value. In many of the decisions cited by plaintiff the reviewing courts relied upon specific findings of fraud made by the trial court, whereas the case at bar is devoid of any element of actual fraud on the part of Cook, so far as the record discloses.

Plaintiff, evidently recognizing the distinction between the line of cases where actual fraud was involved and the lack thereof in these proceedings, argues that the conveyance of Cronin's interest to the Mutual National Bank of Chicago, as trustee, was fraud per se, and relies on a group of decisions holding that by conveying property with secret reservations for the grantor's benefit, the element of good faith is lacking and a fraudulent intention on the part of the grantor will be presumed. In none of these cases do we find instances where the mutual rights and interests of the parties were so clearly defined as they were in the trust deed here under consideration. A reading of the provision of the trust deed hereinbefore quoted discloses that Cronin did not divest himself of his interest in the property, but merely caused a change of his interest from realty to personalty. Many cases involving similar trust deeds, wherein the courts have held that the interest of the beneficiary is personal property, are cited in defendants' brief, among them being Aronson v. Olsen, 348 Ill. 26, 28-29; Chicago Title & Trust Co.,

the beneficial interest from Cronin was bound to know that the trust might have been created to defraud Cronin's creditors, and that Cook had constructive notice from the mere fact that he was purchasing an interest in a trust which he alleges as having been made to defraud creditors. The deed in question, however, clearly defines the mutual rights and interests of the parties thereto, and therefore negatives any element of secret reservations. In this respect the case at bar differs from many of the decisions cited by plaintiff, where debtors for reasons best known to themselves conveyed title by deeds absolute on their face, making no reservations of benefit to the grantor. Those cases cannot be held to involve the rights of innocent purchasers for value. In many of the decisions cited by plaintiff the reservations were relied upon as specific limitations of trust made by the total grant, whereas the case at bar is devoid of any element of secret trust on the part of Cook, so far as the record discloses.

Plaintiff, evidently recognizing the distinction between the line of cases where actual fraud was involved and the line where it is merely suggested, argues that the conduct of Cronin's interest in the mutual building loan of Chicago, as limited, was fraudulent, and relied on a group of decisions holding that by conveying property with secret reservations for the grantor's benefit, the element of good faith is lacking and a fraudulent intention on the part of the grantor will be presumed. In none of these cases do we find instances where the mutual rights and interests of the parties were so clearly defined as they were in the trust deed here under consideration. A review of the provisions of the trust deed before quoted discloses that Cronin did not divest himself of his interest in the property, but merely created a trust of his interest therein for the benefit of the mutual building loan of Chicago, and that the court have held that the interest of the beneficiary in personal property, was also in real estate, and that the same principle applied to the case at bar.

Trustee v. The Illinois Merchants Trust Co., 329 Ill. 334, at pp. 338, 339-350, 351; Chicago, North Shore & Milwaukee R. R. v. Chicago Title & Trust Co., Trustee, 328 Ill. 610-612, 613; Sweesy v. Hoy, 324 Ill. 319-321.

The salient consideration in the case, as we view it, was the assignment of Cronin's interest, in May, 1934, to defendant Cook. The circumstances under which this took place have already been set forth, and are clearly established of record. After Cook had taken over the property from Cronin and Cushing, and upon payment to them of \$150 each, Cook executed a release of the trust deed and paid the accrued taxes on the property for 1931 and 1933. It was not until shortly before the filing of the complaint in this proceeding that Cook first learned of plaintiff's judgment against Cronin. According to the undisputed evidence he was an innocent purchaser for value, having given a valuable consideration for the assignment of Cronin's interest, without knowledge or notice of any judgment against Cronin. Aside from these considerations the record is silent as to Cronin's financial condition at the time the assignment was made. Plaintiff failed to adduce any proof of Cronin's financial responsibility, or the lack thereof at the time, or that any of his creditors were prejudiced by the assignment. In Hughes v. Noyes, 171 Ill. 575, the court had a similar question under consideration and said that there were several modes of ascertaining the fraudulent intent referred to in secs. 4 and 5 of chap. 59 of Illinois Revised Stats. (upon which plaintiff here relies) as follows: "(1) It may be presumed from the circumstances as a conclusive presumption of law; (2) as a prima facie or rebuttable presumption of law; (3) as an argumentative conclusion of fact." And quoting from Pomeroy's Equity Jurisprudence, vol. 2, p. 971, the court said (p. 580): "'In the first place, where a conveyance is made upon a valuable consideration and is alleged to be fraudulent against the grantor's creditors, an actual or express intent to hinder, delay or defraud is necessary to be proved. *** In other words, the actual and express fraudulent intent must be proved by evidence tending to show its existence, and from which it legiti-

Ill. 319-321. The Illinois Supreme Court, 100 Ill. 2d 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

The salient consideration in the case, as we view it, was the assignment of Cronin's interest, in May, 1934, to defendant Cook. The circumstances under which this took place have already been set forth, and are clearly established of record. After Cook had taken over the property from Cronin and Oshing, and upon payment to them of \$170 each, Cook executed a release of the trust deed and paid the accrued taxes on the property for 1931 and 1932. It was not until shortly before the filing of the complaint in this proceeding that Cook first learned of plaintiff's judgment against Cronin, according to the undisputed evidence he was an innocent purchaser for value, having given a valuable consideration for the assignment of Cronin's interest, without knowledge or notice of any judgment against Cronin, aside from these considerations the record is silent as to Cronin's financial condition at the time the assignment was made. Plaintiff failed to submit any proof of Cronin's financial responsibility, or the lack thereof at the time, or that any of his creditors were prejudiced by the assignment. In Hughes v. Hayes, 171 Ill. 572, the court had a similar question under consideration and said that there were several modes of ascertaining the fraudulent intent referred to in secs. 4 and 5 of chap. 93 of Illinois Revised Stat. (upon which plaintiff here relies) as follows: "(1) It may be presumed from the circumstances as a conclusive presumption of law; (2) as a prima facie or rebuttable presumption of law; (3) as an argumentative conclusion of law." and further from Hayes v. Hayes, 171 Ill. 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

mately results as a conclusion of fact drawn by a court or jury, without the aid of legal presumptions. In the second place, where a conveyance is voluntary and is alleged to be fraudulent as against existing creditors, while an express actual intent to defraud may be present it is not necessary. The **fraudulent** intent which will avoid the conveyance as against existing creditors may be inferred from circumstances connected with the transaction, such as the grantors' insolvency, great indebtedness compared with the amount of his property and the like. Complete insolvency, however, is clearly not a requisite."

Moreover, it has been held that a purchaser of property under circumstances such as appear in the case at bar is not charged with constructive notice of an intent to defraud creditors. In Feuer v. Schaller, 187 N. Y. S. 530, a judgment debtor had conveyed property to his wife in fraud of his creditors, and the wife in turn had conveyed title to her brother under a secret agreement that he would hold title for the judgment debtor. The court held adversely to the plaintiff's contention as to constructive fraud, and entered judgment in favor of an innocent purchaser, upon the ground that he had no previous notice of the fraudulent intent of his immediate grantor. To the same effect is Lewis v. Dudley, 49 Atl. 572, 70 N. H. 594. The case at bar is stronger than either of these decisions upon the facts, because there was nothing to denote a fraudulent intent on the part of Cronin, or knowledge on the part of Cook when he acquired Cronin's interest in the trust, which had stood unassailed for approximately seven years. In all the decisions that have been called to our attention the courts have consistently held that the burden of proving fraud devolved upon the plaintiff. No such proof was made, and the record being conclusive as to the lack of knowledge on the part of Cook, we are impelled to hold that he acted in good faith in the transaction.

The only other ground urged for reversal is that the deed in trust, No. 129, violates the rule against perpetuities. Under this

... results as a conclusion of fact drawn by a court of law,
... the aid of legal presumptions. In the second place, where
a conveyance is voluntary and is alleged to be fraudulent as against
existing creditors, while an express actual intent to defraud may be
present it is not necessary. The fraudulent intent which will avoid
the conveyance as against existing creditors may be inferred from
circumstances connected with the transaction, such as the grantor's
insolvency, great indebtedness compared with the amount of his
property and the like. Complete insolvency, however, is clearly not
a requisite."

Moreover, it has been held that a purchaser of property under
circumstances such as appear in the case at bar is not charged with
constructive notice of an intent to defraud creditors. In Wentz v.
Scheller, 187 N. Y. 2, 730, a judgment debtor had conveyed property
to his wife in fraud of his creditors, and the wife in turn had con-
veyed title to her brother under a secret agreement that he would hold
title for the judgment debtor. The court held adversely to the
plaintiff's contention as to constructive fraud, and entered judgment
in favor of an innocent purchaser, upon the ground that he had no
previous notice of the fraudulent intent of his immediate grantor.
To the same effect is Leake v. Miller, 20 Ill. 202, 19 Ill. 202. The
case at bar is stronger than either of these decisions upon the facts,
because there was nothing to induce a fraudulent intent on the part of
Graham, or knowledge on the part of Cook when he acquired Graham's
interest in the tract, while the Court manifestly was apprehensive
seven years. In all the decisions that have been cited to our
attention the courts have consistently held that the burden of proving
fraud devolved upon the plaintiff. No such proof was made, and the
record being conclusive as to the lack of knowledge on the part of
Cook, we are impelled to hold that he acted in good faith in the
transaction.

The only other ground upon which reversal is urged is that the trial
court, in its decision, was erroneous in its application of the law.

heading plaintiff's brief contains the following statement: "The plaintiff and appellant is not seeking to set aside the Deed in Trust merely because it is based upon, and is limited and governed by, a secret and hidden trust established by the owner for his own benefit; nor even because the term of the trust created thereby has terminated; nor yet because the trust is a perpetuity. To do any of these things of themselves, he would have no standing in Court unless he were hurt thereby. These matters are only evidences or elements of fraud and it is the fraud which entitles us to appeal to a court of chancery." From this it would appear that it becomes unnecessary for us to discuss the contention made with reference to the violation of the rule against perpetuities, in view of our conclusion that fraud has not been shown and that Cook was an innocent purchaser for value.

The simple and undisputed facts presented by this record disclose that Cronin's interest in trust deed No. 129 was transferred to Cook by assignment on May 21, 1934; that Cook had no knowledge of plaintiff's judgment against Cronin until almost two years later, when the complaint was filed, and, having paid a valuable consideration for the assignment, was in fact an innocent purchaser for value. Under the circumstances we are of the opinion that plaintiff is not entitled to reach any interest that Cronin had had in the trust, long after Cronin had disposed of his interest therein to Cook. The decree of the Superior court should be affirmed. It is so ordered.

DECREE AFFIRMED.

Sullivan, P. J., and Scanlan, J., concur.

meaning plaintiff's bill seeks the following relief: That
 plaintiff and appellant is not seeking to set aside the deed in trust
 merely because it is based upon, and is limited and governed by, a
 secret and hidden trust established by the owner for his own benefit;
 nor even because the term of the trust created thereby has terminated;
 nor yet because the trust is a perpetuity. To do any of these things
 of course, he would have no standing in Court unless he were hurt
 thereby. These matters are only evidences or elements of fraud and it
 is the fraud which entitles us to appeal to a court of chancery. "From
 this it would appear that it becomes unnecessary for us to discuss the
 consideration made with reference to the violation of the rule against
 perpetuities, in view of our conclusion that fraud has not been shown
 and that Cook was an innocent purchaser for value.
 The simple and undisputed facts presented by this record
 disclose that Cronin's interest in trust deed No. 129 was transferred
 to Cook by assignment on May 21, 1914; that Cook had no knowledge of
 plaintiff's interest against Cronin until almost two years later, when
 the complaint was filed, and, having paid a valuable consideration
 for the assignment, was in fact an innocent purchaser for value. Under
 the circumstances we are of the opinion that plaintiff is not entitled
 to reach any interest that Cronin had had in the trust, long after
 Cronin had disposed of his interest therein to Cook. The decree of
 the superior court should be affirmed. It is so ordered.

Delivered, P. J. and Benjamin, J., concur.

40598

MARIE ANN JELLEMA,
Appellant.

v.

ALFRED R. HULBERT,
Appellee.

APPEAL FROM SUPERIOR COURT,
COOK COUNTY.

302 I.A. 432

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Plaintiff sued for an accounting of funds received by defendant, an attorney at law, in the settlement of a judgment owned by plaintiff. The cause was referred to a special commissioner, who recommended the complaint be dismissed for want of equity. The chancellor overruled plaintiff's objections to the special commissioner's report, and entered a decree in accordance with the commissioner's recommendations, from which plaintiff appeals.

This is the second appeal by plaintiff from an adverse judgment. In the former suit the issue presented was whether defendant was liable as the drawer of the check sued upon. We resolved that cause in favor of defendant, setting forth fully in case No. 37394, 277 Ill. App. 612, all the circumstances attending the transaction. The facts essential for a consideration of the issues involved in this appeal disclose that plaintiff had employed defendant as her attorney at law to prosecute her claim against Claude M. Lauer and Clarence Siler for damages arising out of an automobile accident which occurred in June, 1931. Under the contract of employment defendant was to be paid as his compensation one-fourth of the total amount recovered if the case were settled, and one-third of the total amount in the event of trial, all costs and expenses of suit to be paid by plaintiff. The suit was instituted in the Circuit court of Cook county and a judgment was rendered in plaintiff's favor for \$8,000 and costs. Lauer and Siler carried insurance with the Detroit Automobile Inter Insur-

3021.A.482

COOK COUNTY.

CHIEF CLERK OF COURT.

STATE OF ILLINOIS

CLERK OF COURT

IN JUDGE'S CHAMBER DELIVERED THE OPINION OF THE COURT.

Plaintiff sued for an accounting of funds received by

defendant, an attorney at law, in the settlement of a judgment

owned by plaintiff. The cause was referred to a special commissioner

and, who recommended the complaint be dismissed for want of equity.

The chancellor overruled plaintiff's objections to the special

commissioner's report, and entered a decree in accordance with

the commissioner's recommendations, from which plaintiff appeals.

This is the second appeal by plaintiff from an adverse

judgment. In the former suit the issue presented was whether

defendant was liable as the drawer of the check sued upon. We

resolved that cause in favor of defendant, setting forth fully

in case No. 27394, 277 Ill. App. 618, all the circumstances attending

the transaction. The facts essential for a consideration of

the issues involved in this appeal disclose that plaintiff had

employed defendant as her attorney at law to prosecute her claim

against Claude M. Jauer and Clarence Miller for damages arising out

of an automobile accident which occurred in June, 1931. Under the

contract of employment defendant was to be paid as his compensation

one-fourth of the total amount recovered if the case were settled,

and one-third of the total amount in the event of trial, all costs

and expenses of suit to be paid by plaintiff. The suit was

instituted in the Circuit Court of Cook County and a judgment was

rendered in plaintiff's favor for \$8,000 and costs. Jauer and

Miller carried insurance with the Detroit Automobile Inter Insur-

ance Exchange, of Detroit, Mich. The judgment being unpaid, defendant, with the consent of plaintiff, employed Black and Black, attorneys in Detroit to assist in collecting the judgment. A settlement was effected by which plaintiff agreed to accept \$5,027.10, in full satisfaction of her claim. Payment of this settlement was made by the Detroit Automobile Inter Insurance Exchange through means of two checks or drafts, each dated June 18, 1932, drawn on the First Wayne National Bank of Detroit, Michigan, one of these checks being for \$1,000, payable to Black and Black, the Detroit counsel, and the other for \$4,027.10, payable to "Alfred Roy Hulbert, Attorney for Marie Ann Jellema." Both of these checks were delivered by the Detroit Automobile Inter Insurance Exchange to Black and Black, who deducted from the \$1,000 check \$513.81 to cover their fees and expenses, and then forwarded to defendant, together with the check for \$4,027.10, another check for \$486.19, drawn on the First National Bank of Detroit, Michigan, payable to defendant, as attorney for Marie Ann Jellema. The two checks thus forwarded by Black and Black to defendant were received by him at his office in Chicago June 20, 1932. On that date defendant telephoned plaintiff and told her that the Detroit checks had been received and requested that she come to his office. On the morning of the following day June 21, 1932, plaintiff and her father called on defendant at his office and at his suggestion indorsed the checks so that collection thereon might be started. Both plaintiff and her father testified that nothing was said by defendant as to the method or manner of collecting the two checks, while defendant testified that he had on several occasions explained to plaintiff and her father that he would have to deposit the checks in an account in his bank and would make distribution according to a statement, which the evidence shows (by agreement of counsel) was delivered to plaintiff by defendant a short time prior to his receipt of the checks. The special commissioner found that "all of the facts and circumstances are persuasive that the plaintiff was fully advised that defendant would deposit said checks or

and exchange, of Detroit, Mich. The judgment being unpaid, defendant, with the consent of plaintiff, assigned to defendant, a settlement was in Detroit to assist in collecting the judgment. A settlement was effected by which plaintiff agreed to accept \$1,000.00, in full satisfaction of her claim. Payment of this settlement was made by the Detroit Automobile Inter Insurance Exchange through means of two checks or drafts, each dated June 18, 1932, drawn on the First Wayne National Bank of Detroit, Michigan, one of these checks being for \$1,000.00, payable to Black and Black, the Detroit counsel, and the other for \$1,000.00, payable to "Alfred Roy Kibbert, Attorney for Marie Ann Tellman." Both of these checks were delivered by the Detroit Automobile Inter Insurance Exchange to Black and Black, who deposited them in the \$1,000 trust fund. To pay their fees and expenses, and then forwarded to defendant, together with the check for \$1,000.00, making a total of \$2,000.00, from on the First National Bank of Detroit, Michigan, payable to defendant, as attorney for Marie Ann Tellman. The two checks were forwarded by Black and Black to defendant who received them at the office in Chicago June 22, 1932. On that date defendant deposited plaintiff and told her that the Detroit check had been received and deposited and she took to his office. On the morning of the following day June 23, 1932, plaintiff and her father called on defendant at his office and of his suggestion informed the matter to that relation. Thereafter when he started. Both plaintiff and her father testified that nothing was said by defendant as to the method or manner of collecting the two checks, while defendant testified that he had on several occasions explained to plaintiff and her father that he would have to deposit the checks in an account in his bank and would make distribution according to a statement, which the evidence shows (by agreement of counsel) was delivered to plaintiff by defendant a short time before the receipt of the checks. The special stipulation (June 24) "All of the facts and circumstances are persuasive that the plaintiff has fully advised that defendant would deposit said checks or

drafts in his bank and would make distribution to plaintiff of her share when the same had been collected; plaintiff was aware that the checks or drafts came from City of Detroit, where the settlement had been effected; she admits she was advised at the time of indorsing said checks that it was for the purpose of starting collection, and admits she previously received from defendant a statement of account showing the amount due her." Defendant deposited the checks in his personal checking account in the Chicago Bank of Commerce June 21, 1932. The special commissioner found from the evidence that for a period of years defendant had an arrangement with the Chicago Bank of Commerce whereby he was invariably notified when drafts deposited by him had been collected, but in the instant case no such notice was given to him; that afterward on June 24, 1932, defendant wrote plaintiff a letter in which he advised her he was enclosing a **check** in the amount of \$3,058.99, the balance due her, "but the evidence shows, and the special commissioner finds, that by postscript to said letter plaintiff was advised that before the letter was mailed defendant had been served with summons in garnishment suits filed in the Municipal court, garnisheeing the funds belonging to plaintiff, then in defendant's possession, for the hospital and doctor's bills incurred in treating plaintiff for injuries sustained in said automobile accident." The Chicago Bank of Commerce closed its doors by order of the Auditor of Public Accounts on June 25, 1932, and plaintiff's father was so advised on the morning of that date, when he called at defendant's office. Upon learning this fact, plaintiff's father requested and was given the check mentioned in the letter which defendant had written plaintiff, for the purpose of attempting collection of same through a friendly acquaintance.

In the former suit brought by plaintiff against defendant, the principal question involved was whether defendant was liable as the drawer of the check sued upon. In this proceeding plaintiff seeks an accounting from defendant on the theory that he was a

...in his bank and books were maintained in relation to her share when the same had been collected; plaintiff was aware that the checks or drafts came from City of Detroit, where the settlement had been effected; she admits she was advised at the time of endorsing said checks that it was for the purpose of starting collection, and admits she previously received from defendant a statement of account showing the amount due her. Defendant deposited the

checks in his personal checking account in the Chicago Bank of Commerce June 21, 1932. The special commissioner found from the evidence that for a period of years defendant had an arrangement with the Chicago Bank of Commerce whereby he was invariably notified when drafts deposited by him had been collected, but in the instant case no such notice was given to him until afterward on June 14, 1932.

Defendant wrote plaintiff a letter in which he advised her he was endorsing a check in the amount of \$3,028.99, the balance due her, but the evidence shows, and the special commissioner finds, that by postmark on said letter plaintiff was advised that before the letter was mailed defendant had been advised that same in relation to what was filed in the Municipal Court, notwithstanding the fact belonging to plaintiff, that in defendant's possession, for the purpose of collecting said money, was a letter from plaintiff to defendant and another's letter received in relation to the Chicago Bank of Commerce.

Defendant closed its doors by order of the Justice of the Peace on June 25, 1932, and plaintiff's father was so advised on the morning of that date, when he called at defendant's office. Upon learning this fact, plaintiff's father requested and was given the check mentioned in the letter which defendant had written plaintiff, for the purpose of obtaining collection of same through a friendly acquaintance.

In the former suit brought by plaintiff against defendant, the principal question involved was whether defendant was liable as the drawer of the check sued upon. In this proceeding plaintiff seeks an accounting from defendant on the theory that he was a

trustee for plaintiff's benefit of the checks received by him in settlement of plaintiff's judgment. The two principal questions presented are (1) whether the proceeds of these checks represented trust funds, and (2) if so, whether defendant rendered himself personally liable for the amounts involved by reason of depositing the checks in his personal account rather than in his name as trustee for plaintiff. The special commissioner found that when plaintiff and her father visited defendant's office on the morning of June 21, they were advised that the reason for securing plaintiff's indorsement was to enable defendant to start collection of these two checks; that a statement showing the manner of distribution of the proceeds of the settlement had been delivered to plaintiff by defendant a short time prior to the receipt of the checks; that plaintiff was aware that the checks had come from the City of Detroit, where the settlement was effected, and that all the circumstances "tend strongly to corroborate defendant's testimony that the deposit of said checks to defendant's account in his bank, Chicago Bank of Commerce, was with the full knowledge and consent of the plaintiff." From these circumstances the special commissioner concluded and found that by reason of the written contract entered into between the parties, plaintiff and defendant were jointly interested in the proceeds of the two checks received from Detroit, and accordingly jointly interested in the funds deposited in the closed bank after the collection of said checks; that the method and manner of the deposit and collection was with the consent and approval of plaintiff, and therefore the act of defendant in depositing and collecting the checks in the manner disclosed by the evidence, was the act of plaintiff. The commissioner also found that these funds were not vested with the character of trust funds, and that defendant exercised due and proper diligence and caution in all his relations with plaintiff, including the deposit and collection of the checks, and consequently was not liable to plaintiff for her share of the proceeds thereof.

Plaintiff takes the position that the relationship between

trustee for plaintiff's benefit of the checks received by him in settlement of plaintiff's judgment. The two principal questions presented are (1) whether the proceeds of these checks represented Trust Funds, and (2) if so, whether defendant rendered himself personally liable for the amounts involved by reason of depositing the checks in his personal account rather than in his name as trustee for plaintiff. The special commissioner found that when plaintiff and her father visited defendant's office on the morning of June 21, they were advised that the reason for wanting plaintiff's judgment was to enable defendant to start collection of these two checks; that a statement showing the manner of distribution of the proceeds of the settlement had been delivered to plaintiff by defendant a short time prior to the receipt of the checks; that plaintiff was aware that the checks had come from the City of Detroit, were the settlement of a judgment, and that all the circumstances "tend strongly to corroborate defendant's testimony that the deposit of said checks to defendant's account in his bank, Chicago Bank of Commerce, was with the full knowledge and consent of the plaintiff." From these circumstances the special commissioner concluded and found that by reason of the written contract entered into between the parties, plaintiff and defendant were jointly interested in the proceeds of the two checks received from Detroit, and were jointly interested in the funds deposited in the closed bank after the collection of said checks; that the method and manner of the deposit and collection was with the consent and approval of plaintiff, and therefore the act of defendant in depositing and collecting the checks in the manner indicated by the evidence, was the act of plaintiff. The commissioner also found that these funds were not vested with the character of Trust Funds, and that defendant exercised due and proper diligence and caution in all his relations with plaintiff, including the deposit and collection of the checks, and consequently was not liable to plaintiff for her share of the proceeds thereof.

Plaintiff takes the position that the relationship between

her and defendant being that of attorney and client defendant was bound by the rules of law imposed upon trustees, that since the checks received by defendant in settlement of her judgment, although made payable to defendant as her attorney, were the property of plaintiff and inasmuch as the judgment which they satisfied was plaintiff's judgment it is argued that defendant had merely the legal title as trustee for the benefit of plaintiff, subject to an attorney's lien in favor of defendant for his fees and expenses. There is substantially no dispute as to the facts disclosed by the evidence. It is reasonably clear that before and on June 21 both plaintiff and her father discussed with defendant the deposit of the checks and the method of collection and distribution, and the commissioner so found. They agreed to the procedure outlined by defendant and made no counter suggestions as to any other method of collection and distribution. Obviously, defendant could not safely pay plaintiff her distributive share of the proceeds of these checks until they had cleared through the Detroit banks, and in the ordinary course it would require two or three days to effect the collection. The bank failed to open its doors for business June 25, so that there were only three days, namely, June 22, 23 and 24, during which defendant could have paid plaintiff her share of the settlement. He testified that he had not been notified by the bank that the checks had cleared, and when he finally learned that collection had been made he wrote a letter to plaintiff on June 24 enclosing check for her share, but before that letter was mailed he was served with notice of garnishment proceedings in favor of the doctor and hospital to whom plaintiff was indebted and therefore postponed mailing of the letter and check as a matter of protection to himself in the garnishment proceedings.

Whatever authority defendant had for making collection in the manner indicated was given to him by his client, and the statement of account between the parties indicates that they

her and defendant being that of attorney and client defendant was bound by the rules of law imposed upon trustees, that since the checks received by defendant in settlement of her judgment, although made payable to defendant as her attorney, were the property of plaintiff and inasmuch as the judgment which they satisfied was plaintiff's judgment it is argued that defendant had merely the legal title as trustee for the benefit of plaintiff, subject to an attorney's lien in favor of defendant for his fees and expenses. There is substantially no dispute as to the facts disclosed by the evidence. It is reasonably clear that before and on June 21 both plaintiff and her father discussed with defendant the deposit of the checks and the method of collection and distribution, and the commissioner so found. They agreed to the procedure outlined by defendant and made no counter suggestions as to any other method of collection and distribution. Obviously, defendant could not safely pay plaintiff her distributive share of the proceeds of these checks until they had cleared through the bank, and in the ordinary course of business it would require two or three days to effect the collection. The bank failed to open its doors for business June 23, so that there were only three days, namely, June 22, 23 and 24, during which defendant could have paid plaintiff her share of the settlement. It is contended that he had not been notified by the bank that the checks had cleared, and when he finally learned that collection had been made he wrote a letter to plaintiff on June 24 enclosing check for her share, but before that letter was mailed he was served with notice of garnishment proceedings in favor of the doctor and hospital to whom plaintiff was indebted and therefore postponed mailing of the letter and check as a matter of prudence so as not to be embarrassed by garnishment proceedings.

Whatever defendant had in making collection in the manner indicated was given to him by his client, and the statement of account between the parties indicates that they

agreed to the method of collection and distribution and were therefore jointly interested in the funds in the bank. Under the circumstances we think the special commissioner and chancellor correctly found these funds were not vested with the character of trust funds, as plaintiff contends,

It may be conceded that where a trustee places trust funds in a bank in his own name to his individual credit, rather than in his name as trustee or in the name of the beneficiary of the trust, he thereby renders himself liable for the funds on the failure of the bank where the funds were deposited, but in order to invoke this principle it must first clearly appear that the funds were in fact trust funds and we do not so hold for the reasons heretofore given. The courts have repeatedly held that in order to establish a trust the party claiming it is required to submit proof of a clear and convincing character, and if the evidence is capable of reasonable explanation upon some theory other than that of a trust, then the trust theory fails. (Neagle v. McMullen, 334 Ill. 168, 175; Banning v. Patterson, 363 Ill. 464, 471, 472; Wiley v. Dunn, 358 Ill. 97, 101.

In August, 1932, defendant filed his proof of claim with the receiver of the insolvent bank in the amount of \$3,571.03, and his claim was allowed for the net sum of \$2,670.22. Afterward in November, 1933, defendant executed an assignment in favor of one Alice M. Ledwith, for the sum of \$1,563.40, representing part of this claim. Defendant contends that the purpose of this assignment of portion of the claim against the bank receiver was to prevent plaintiff's attorneys from carrying out their threats to commence some litigation to tie up the claim and divert the dividend before the garnishment judgments could be fully paid. Whatever the reason for the assignment may have been, its effect was to preserve the fund for payment of the garnishment claims, and defendant did in fact pay the garnishers in full and afterward caused the assignment to be released. Defendant gained nothing through the transaction and plaintiff had her just debts paid thereby. Plaintiff also received subsequent dividends

and gained nothing through the transaction and plaintiff had not
in full and afterwards caused the assignment to be released. Defendant
garnishment claims, and defendant did in fact pay the garnishers
have been, its effect was to preserve the fund for payment of the
could be fully paid. Whatever the reason for the assignment may
the claim and divert the dividend before the garnishment judgments
carrying out their interests to commence some litigation to the up
against the bank receiver was to prevent plaintiff's attorneys from
contends that the purpose of this assignment of portion of the claim
for the sum of \$1,363.40, representing part of this claim. Defendant
defendant executed an assignment in favor of one Alice M. Redden,
was allowed for the net sum of \$2,670.22. Afterward in November, 1932,
receiver of the insolvent bank in the amount of \$3,771.03, and his claim
In August, 1932, defendant filed his proof of claim with the

on the claim filed by defendant with the bank receiver. Plaintiff's contention that this transaction amounted to a conversion of funds by defendant is not borne out by the circumstances. There was no conversion of funds to defendant's own use; the assignment was made as a matter of precaution and defendant in nowise profited thereby.

While it is extremely unfortunate that plaintiff should have lost a portion of the proceeds of her settlement by reason of the closing of the bank, we think the chancellor properly held that defendant is not liable upon the theory of a breach of trust. Accordingly the decree of the Superior court dismissing plaintiff's bill for want of equity should be affirmed. It is so ordered.

DECREE AFFIRMED.

Sullivan, P. J., and Scanlan, J., concur.

on the claim filed by defendant with the same testimony. Plaintiff's contention that this transaction amounted to a conversion of funds by defendant is not borne out by the circumstances. There was no conversion of funds to defendant's own use; the assignment was made as a matter of precaution and defendant in no wise profited thereby.

While it is extremely unfortunate that plaintiff should have lost a portion of the proceeds of her settlement by reason of the closing of the bank, we think the chancellor properly held that defendant is not liable upon the basis of a breach of trust. Accordingly the decree of the superior court dismissing plaintiff's bill for want of equity should be affirmed. It is so ordered.

WILLIAM L. JONES

Attorney for Plaintiff, and Defendant, J. J. Conner.

40659

THE TURNER TYPE FOUNDERS COMPANY,
a corporation,

Appellant,

v.

STEPHEN LAUB, trading as Reliable
Typesetting Company, and O. K.
Typesetting Company, a corporation,
Appellees.

APPEAL FROM MUNICIPAL

COURT OF CHICAGO.

3021.A.440

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Plaintiff, The Turner Type Founders Company, a corporation, brought suit against Stephen Laub, trading as Reliable Typesetting Company, and O. K. Typesetting Company, a corporation, defendants herein, for the conversion of nine Quick Change Linotype Magazines, which were covered by a chattel mortgage executed by David S. Boshes and E. J. McCarthy, securing an indebtedness to plaintiff for the balance of the purchase price of certain equipment, which included these linotype magazines. The chattels had been sold by mortgagors to defendants. The cause was heard by the court without a jury, resulting in findings and judgment in favor of defendants. Plaintiff appeals.

Briefly set forth the facts disclose that on May 6, 1935, plaintiff sold to David S. Boshes and E. J. McCarthy certain equipment aggregating \$5,000, upon which the purchasers paid on account the sum of \$500, and gave plaintiff notes secured by a chattel mortgage for the balance of the purchase price. The equipment was said to be located on the second floor at 626 Federal street, Chicago. The chattel mortgage bearing the signatures of Boshes and McCarthy was duly recorded, and included ten quick Change Linotype Magazines. The notes evidencing the mortgage were paid as they matured, until June, 1936. Thereafter no payments were made by the mortgagors. Shortly after the purchase of this equipment, Boshes and McCarthy organized a corporation, under the name of McCarthy Typesetting Company, and

THE HUNTER AND TOWNSEND COMPANY,
a corporation,
Plaintiff,

vs.
STEPHEN LAMB, trading as Reliable
Typesetting Company, and O. K.
Typesetting Company, a corporation,
Defendants.

STATE OF CALIFORNIA

COURT OF CIVIL

8021 A. 440

W. J. MCCARTHY, Plaintiff, vs. THE COURT.

Plaintiff, The Turner Typewriter Company, a corporation, brought suit against Stephen Lamb, trading as Reliable Typesetting Company, and O. K. Typesetting Company, a corporation, defendants herein, for the conversion of nine Quick Change Linotype Magazines, which were covered by a chattel mortgage executed by David S. Barnes and E. J. McCarthy, securing an indebtedness to plaintiff for the balance of the purchase price of certain equipment, which included these linotype magazines. The chattels had been sold by mortgagees to defendants. The cause was heard by the court without a jury, resulting in findings and judgment in favor of defendants. Plaintiff appeals.

Briefly set forth the facts disclose that on May 6, 1937, plaintiff sold to David S. Barnes and E. J. McCarthy certain equipment aggregating \$5,000, upon which the purchasers paid on account the sum of \$700, and gave plaintiff notes secured by a chattel mortgage for the balance of the purchase price. The equipment was sold to be located on the second floor at 425 Federal Street, Chicago. The chattel mortgage bearing the signatures of Barnes and McCarthy was duly recorded, and included ten Quick Change Linotype Magazines. The notes evidencing the mortgage were paid in cash matured, until June, 1938. Thereafter no payments were made by the mortgagees. Shortly after the purchase of this equipment, Barnes and McCarthy organized a corporation, under the name of McCarthy Typesetting Company, and

transferred to the corporation certain assets, including the equipment purchased from plaintiff. The evidence discloses that plaintiff was fully aware of the incorporation by Boshes and McCarthy, and in fact plaintiff's attorney was one of the incorporators and held a share of the corporate stock. Furthermore, arrangements were made with the National Builders Bank of Chicago by which Joseph Wertheimer, now plaintiff's president, was required to countersign checks of the McCarthy Typesetting Company, the new corporation, and Mr. Wertheimer testified that this arrangement was made for plaintiff's protection, because only a small down payment had been made on account of the machinery purchased by Boshes and McCarthy, and plaintiff was desirous of keeping a check on expenditures so as to protect plaintiff's investment.

The chattel mortgage contained the usual provision that the mortgagors were to retain possession of the chattels and at their own expense to keep and use the same until default in payment of either principal or interest, and that in case of default or in the event that the mortgagee should feel insecure or unsafe, the mortgagee might, without notice, take immediate possession of the property.

Three of the Quick Change Linotype Magazines included in the mortgage were sold to one of the defendants, O. K. Typesetting Company, a corporation, July 23, 1936, for \$210, and July 25, 1936, defendant Laub purchased six of the magazines from the mortgagor for \$400. In connection with both of these sales McCarthy represented that the chattels belonged to the corporation, and in the case of Laub McCarthy, as president of the corporation, executed an affidavit certifying that the chattels were unincumbered. In order to safeguard their purchase O. K. Typesetting Company caused a chattel mortgage search to be made to determine whether McCarthy Typesetting Company, from whom they were purchasing these magazines, had mortgaged any of the chattels, but inasmuch as the mortgage was executed by Boshes and McCarthy the search did not disclose the mortgage in question. Laub's attorney said on oral argument that he had also made a search of the records, but there

transferred to the corporation certain assets, including the equipment purchased from plaintiff. The evidence discloses that plaintiff was fully aware of the incorporation by Boeshes and McCarthy, and in fact plaintiff's attorney was one of the incorporators and held a share of the corporate stock. Furthermore, arrangements were made with the National Builders Bank of Chicago by which Joseph Wertheimer, now plaintiff's president, was required to contribute a share of the plaintiff's capital. The corporation was made for plaintiff's protection, because only a small down payment had been made on account of the machinery purchased by Boeshes and McCarthy, and plaintiff was desirous of keeping a check on expenditures so as to protect plaintiff's investment.

The chattel mortgage contained the usual provision that the mortgagors were to retain possession of the chattels and at their own expense to keep and use the same until default in payment of either principal or interest, and that in case of default or in the event that the mortgagors should feel insecure or unsafe, the mortgagee might, without notice, take immediate possession of the property.

Three of the Quick Change Linotype Magazines included in the mortgage were sold to one of the defendants, O. K. Typesetting Company, a corporation, July 23, 1936, for \$210, and July 25, 1936, defendant plaintiff purchased six of the magazines from the mortgagor for \$400. In connection with both of these sales McCarthy represented that the chattels belonged to the corporation, and in the case of Lamb McCarthy as president of the corporation, executed an affidavit certifying that the chattels were unincumbered. In order to retain their purchase O. K. Typesetting Company caused a chattel mortgage search to be made in relation to the corporation's ownership, from which they were furnished these magazines, had mortgaged any of the chattels, but inasmuch as the mortgage was executed by Boeshes and McCarthy the search did not disclose the mortgage in question. Lamb's attorney said on oral argument that he had also made a search of the records, but there

is no evidence to that effect other than counsel's statement, and plaintiff insists that the court ought not to take cognizance of the voluntary statement of defendants' counsel without any evidence indicating that a search had been made. It may be assumed, however, that if Laub's attorney made a search of the mortgage records against McCarthy Typesetting Company the search would not have disclosed the mortgage executed by Boshes and McCarthy, as individuals.

Upon this state of the record the question presented is whether defendants were innocent purchasers of the chattels without notice. In Illinois where possession is retained by the mortgagor the statute requires that the mortgage must be filed of record in order to be valid as against the rights and interests of any third person. (Chap. 95, sec. 4, Ill. Rev. Stats. 1939.) The difficulty in this proceeding arises from the fact that although the chattel mortgage was duly recorded, as executed by Boshes and McCarthy, the subsequent incorporation by these individuals under the name of McCarthy Typesetting Company made it difficult, if not impossible, for anybody purchasing from the corporation to ascertain through a chattel mortgage search that these particular linotype magazines were incumbered. Plaintiff's counsel argues that the only linotype magazines ever owned by the McCarthy Typesetting Company, either as a partnership or corporation, were the ten **quick Change** Linotype Magazines included in plaintiff's mortgage, and that since the property described was all of that particular kind owned by the mortgagors and located on the premises named, defendants "aided by inquiries which the instrument itself suggests" should have been able to identify the property as mortgaged chattels. The fallacy of this argument is that defendants were not in anywise apprised or had no reason to believe that these chattels were mortgaged. Defendant Laub had required McCarthy to make an affidavit to the effect that the chattels were unincumbered, and the search made by the O. K. Typesetting Company disclosed no information from which a purchaser could have acquired information as to the existing mortgage. On the other hand plaintiff knew that Boshes and

is no evidence in any of the other documents, and
plaintiff insists that the search ought not to have been made at the
voluntary statement of defendant's counsel without any evidence in-
dicating that a search had been made. It may be assumed, however,
that if such a statement were made of the mortgage records against
McCarty Typewriting Company the search would not have disclosed the
mortgage executed by James and McCarty, as indicated.
Upon this state of the record the question presented is
whether defendant was innocent purchaser of the estate without
notice. It is held that notice is required by the mortgage
the mortgage requires that the mortgage may be filed of record in order
to be valid as against the rights and interests of any third person,
(Chas. 92, sec. 4, Ill. Rev. Stat. 1917). The difficulty in this
proceeding arises from the fact that although the stated mortgage
was duly recorded, as evidenced by books and indexes, the mort-
gagor incorporation by James and McCarty was the name of McCarty
Typewriting Company was in Illinois, it is not impossible, for any
person coming from the corporation to ascertain through a chattel mort-
gage search that these particular linotype machines were incumbered.
Plaintiff's counsel argues that the only linotype machines ever owned
by the McCarty Typewriting Company, either as a partnership or cor-
poration, were the ten **Quick Change** linotype machines included in
plaintiff's mortgage, and that since the property described was all
of that particular kind owned by the mortgagors and located on the
premises owned, defendant's claim by inference with the instrument
itself suggests" should have been able to identify the property as
mortgaged chattels. The fallacy of this argument is that defendant
was not in any way dependent on the record to believe that these
chattels were mortgaged. Defendant had had required McCarty to make
an affidavit to the effect that the chattels were unincumbered, and
the search made by the O. R. Typewriting Company disclosed no infor-
mation from which a purchaser could have acquired information as to the
existing mortgage. On the other hand plaintiff knew that James and

McCarthy had incorporated after the mortgage was made, and in the exercise of prudence and for its own protection it should have required either a new mortgage to be executed by McCarthy Typesetting Company and recorded, or an affidavit by Boshes and McCarthy setting forth the facts pertaining to the transaction and showing the transfer of the property to the new company, and the recordation of that instrument so that prospective purchasers or subsequent mortgagees might have had notice of the existing incumbrance. Having failed to do either of these things plaintiff made it possible for the McCarthy Typesetting Company to sell the mortgaged chattels to defendants who had no reasonable means of ascertaining the facts. Both defendants purchased the linotype magazines in good faith and paid cash therefor, and did all that could reasonably be required of them in ascertaining that the chattels were owned by the McCarthy Typesetting Company, and free from incumbrance. Under the circumstances, we are impelled to hold that both defendants were in fact innocent purchasers without notice. The court who heard the witnesses found adversely to plaintiff's claim and no contention is made that the findings are contrary to the manifest weight of the evidence. The finding and judgment of the court as to both defendants should be affirmed. It is so ordered.

FINDING AND JUDGMENT AFFIRMED.

Sullivan, P. J., and Scanlan, J., concur.

McCarthy had been mortgaged after the mortgage was made, and in the exercise of prudence and for its own protection it should have required either a new mortgage to be executed by McCarthy Typewriting Company and approved, or an affidavit by Holmes and McCarthy setting forth the facts pertaining to the transaction and showing the transfer of the property to the new company, and the rescission of that instrument so that prospective purchasers or subsequent mortgagees might have had notice of the existing incumbrance. Having failed to do either of these things plaintiff made it possible for the McCarthy Typewriting Company to sell the mortgaged chattels to defendants who had no reasonable means of ascertaining the facts. Both defendants purchased the typewriters in good faith and paid cash therefor, and did all that could reasonably be required of them in ascertaining that the chattels were owned by the McCarthy Typewriting Company, and that the same were theirs. Under the circumstances, we are impelled to hold that both defendants were in fact innocent purchasers without notice. The court who heard the case found adversely to plaintiff's claim and no contention is made that the findings are contrary to the manifest weight of the evidence. The finding and judgment of the court as to both defendants should be affirmed. It is so ordered.

THOMAS J. FOLEY, JUDGE.

McCarthy, J. J., and Holmes, J., concur.

40677

CLARA DUNN et al.,
Plaintiffs,

v.

ANNIE DUNN et al.,
Defendants.

HENRY W. KENOE,
Petitioner and Appellee,

v.

ALICE DUNN,
Respondent and Appellant.

APPEAL FROM SUPERIOR COURT,
COOK COUNTY.

302 I.A. 441

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

The respondent, Alice Dunn, appeals from an order of the Superior court awarding Henry W. Kenoe, petitioner, the amount of \$500 as attorney's fees for services rendered by him in a chancery proceeding then pending in the Superior court.

In the original suit filed in 1935 Clara Dunn, respondent's sister, sought a decree against Annie Dunn, their mother, to impress a trust upon several parcels of real estate. Pending the disposition of this proceeding, Annie Dunn, the mother, died. The cause was thereafter allowed to remain pending for about two years, when respondent and another sister who claimed the real estate under a joint tenancy retained petitioner to represent them in that litigation. Clara Dunn, the original plaintiff, then filed an amended and supplemental complaint in which she joined as additional plaintiffs four of her brothers and sisters, and designated as parties defendant the respondent and another sister, Mary O'Brien, who was administratrix of the mother's estate. The amended complaint not only sought to establish a trust against the real estate, but also to set aside the deeds under which respondent claimed title as surviving joint tenant, and it also prayed for an accounting. Peti-

40077

CLARA DUNN et al.,
Plaintiffs,

v.

ANNIE DUNN et al.,
Defendants.

HENRY W. KENOE,
Petitioner and Appellee,

v.

ALICE DUNN,
Respondent and Appellant.

MR. JUSTICE TRIENDEL DELIVERED THE OPINION OF THE COURT.

The respondent, Alice Dunn, appeals from an order of the Superior court awarding Henry W. Kenoe, petitioner, the amount of \$200 as attorney's fees for services rendered by him in a chancery proceeding then pending in the Superior court.

In the original suit filed in 1935 Clara Dunn, respondent's sister, sought a decree against Annie Dunn, their mother, to impress a trust upon several parcels of real estate. Pending the disposition of this proceeding, Annie Dunn, the mother, died. The cause was

thereafter allowed to remain pending for about two years, when respondent and another sister who claimed the real estate under a joint tenancy retained petitioner to represent them in that litigation. Clara Dunn, the original plaintiff, then filed an amended and supplemental complaint in which she joined as additional plaintiffs four of her brothers and sisters, and designated as parties defendant the respondent and another sister, Mary O'Brien, who was administratrix of the mother's estate. The amended complaint not only sought to establish a trust against the real estate, but also to set aside the deeds under which respondent claimed title as surviving joint tenant, and it also prayed for an accounting. Peti-

8081.A.441

DOCK COURT.
APPEAL FROM THE COURT.

tioner represented respondent and Mary O'Brien in the litigation under the issues thus raised. The cause was referred to a master and after more than a year of litigation resulted in a decree in respondent's favor. In the course of the proceeding a certain fund was brought into court and deposited with the clerk, and by the decree it was found that the respondent was entitled to this fund.

Shortly before the entry of the decree a dispute arose between petitioner and respondent as to the payment of his fees for legal services rendered in the course of the litigation. Following this controversy respondent filed a petition in the Superior court praying that she be allowed to substitute Charles R. Barrett as her attorney in lieu of petitioner. No order was entered, however, until petitioner presented a final decree in the principal litigation. Under this decree the court retained jurisdiction of the funds in the hands of the clerk until the disposition of petitioner's claim for fees, and at the same time an order was entered substituting Mr. Barrett in lieu of petitioner as attorney for respondent. Following the entry of the decree petitioner filed his petition for the adjudication of his fees, which set forth an agreement between him and respondent that the amount of his fees be submitted to the trial court for disposition and paid out of the funds in the hands of the clerk. No objection was interposed to the filing of the petition and respondent was ordered to answer within ten days. The matter was then set for hearing on December 7, 1938. Several days prior thereto Mr. Barrett, the substituted counsel, withdrew his appearance, with respondent's consent. The hearing on the petition was then continued until December 10, 1938, when, pursuant to a hearing, an order was entered allowing petitioner a fee in the sum of \$500. January 7, 1939, respondent, through a third attorney, sought ^{leave} to file a motion and supporting affidavits to vacate the order allowing fees. Leave to file these documents was denied, and respondent appealed.

As ground for reversal it is urged (1) that the court cannot allow or tax a solicitor's fee in the absence of statute, and to do so

lition represented respondent and Mary O'Brien in the litigation and the issues thus raised. The cause was referred to a master and after more than a year of litigation resulted in a decree in respondent's favor. In the course of the proceeding a certain fund was brought into court and deposited with the clerk, and by the decree it was found that the respondent was entitled to said fund.

Shortly before the entry of the decree a dispute arose between petitioner and respondent as to the payment of his fees for legal services rendered in the course of the litigation. Following this controversy respondent filed a petition in the superior court praying that she be allowed to substitute Charles H. Barrett as her attorney in lieu of petitioner. No order was entered, however, until petitioner presented a final decree in the principal litigation. Under this decree the court retained jurisdiction of the funds in the hands of the clerk until the disposition of petitioner's claim for fees, and at the same time an order was entered substituting Mr. Barrett in lieu of petitioner as attorney for respondent. Following the entry of the decree petitioner filed his petition for the substitution of his fees, which set forth an agreement between him and respondent that the amount of his fees be submitted to the trial court for disposition and paid out of the funds in the hands of the clerk. No objection was interposed to the filing of the petition and respondent was ordered to answer within ten days. The matter was then set for hearing on December 7, 1938. Several days prior thereto Mr. Barrett, the substituted counsel, withdrew his appearance, with respondent's consent.

The hearing on the petition was then continued until December 10, 1938, when, pursuant to a hearing, an order was entered allowing petitioner a fee in the sum of \$500. January 7, 1939, respondent, through a third attorney, sought to file a motion and supporting affidavits to vacate the order allowing fees. Leave to file these documents was denied, and respondent appealed.

As ground for reversal it is urged (1) that the court cannot allow or set a petitioner's fee in the absence of statute, and to do so

would amount to judicial legislation from which courts refrain; and (2) that a right of action for legal services confers no extra-judicial power upon a court to hear and adjudicate the question of attorney's fees, especially where a final decree has already been entered, and at the time the petition is filed, or finding made, the attorney is not a party to the proceedings. We find no analogy between the decisions cited in support of point (1) and the case at bar. The authorities upon which respondent relies deal generally with foreclosure proceedings where a dispute arose as to whether fees were allowable under certain trust deeds and in contested partition suits; and the controversy in most instances arose over the power of the court, in the absence of statutory provision, to tax attorney's fees, as costs, against one of the parties to the suit. It is not disputed in the case at bar that respondent agreed to have the matter of fees heard and decided by the trial court, nor is there any doubt that respondent was present in court when the matter was heard, that she filed her answer when ordered to do so by the court, and testified in her own behalf. Under the circumstances, we find no convincing reason why the court, having retained jurisdiction of the subject matter in the decree, and having been requested by both parties to fix the reasonable amount due petitioner, pursuant to an agreement between the parties, should not have heard the controversy and allowed the fee in question. The same procedure was followed in Eriksson v. Boyum, 150 Minn. 192, where an attorney was engaged to institute suit against trustees for their alleged wrongful conduct. The client entered into an agreement with the attorney, which provided that the question of the amount of the attorney's fees was to be determined by the court in the action at the end of the litigation. There, likewise, a petition was filed by the attorney asking the court to fix his compensation, and it was allowed. The reviewing court sustained the judgment or decree, holding adversely to the contentions of the respondent, (1) that the agreement for submission of the attorney's fees to the court is invalid because it conferred no jurisdiction, and (2) that the contract of submission was void as

would amount to judicial legislation from which courts refrain; and (2) that a right of action for legal services confers no extra-judicial power upon a court to hear and adjudicate the question of attorney's fees, especially where a final decree has already been entered, and at the time the petition is filed, or finding made, the attorney is not a party to the proceedings. We find no analogy between the decisions cited in support of point (1) and the case at bar. The authorities upon which respondent relies deal primarily with formal proceedings - suits where a dispute arose as to whether fees were allowable under certain trust deeds and in contested partition suits; and the controversy in most instances arose over the power of the court, in the absence of statutory provision, to tax attorney's fees, as costs, against one of the parties to the suit. It is not disputed in the case at bar that respondent agreed to have the matter of fees heard and decided by the trial court, nor is there any doubt that respondent was present in court when the matter was heard, that she filed her answer when ordered to do so by the court, and testified in her own behalf. Under the circumstances, we find no convincing reason why the court, having retained jurisdiction of the matter until the answer was filed, should have been requested by the parties to fix the amount of fees and attorney's fees in an agreement between the parties, should not have heard the controversy and allowed the fee in question. The same principle was followed in Wickham v. Brown, 120 Minn. 192, where an attorney was engaged to institute suit against trustees for their alleged wrongful conduct. The client entered into an agreement with the attorney which provided that the question of the amount of the attorney's fees was to be determined by the court in the action at the end of the fifth action. There, likewise, a petition was filed by the attorney asking the court to fix his compensation, and it was allowed. The reviewing court sustained the judgment or decree, holding adversely to the contention of the respondent, (1) that the agreement for submission of the attorney's fee to the court is invalid because it limited the jurisdiction, and (2) that the contract of submission was void as

against public policy. Other cases to the same effect are Miller v. Penniman & Bro., 110 Va. 780, 67 S. E. 516; In re Atterbury, 222 N. Y. 355; and In re Goldin, 215 N. Y. Supp. 445, 216 App. Div. 472 (N.Y.). Moreover, there is authority for holding that a court has jurisdiction to entertain and adjudicate the question of attorney's fees when it has a fund before it which has been realized through the efforts of an attorney. In the early case of McCoy v. Appleby Mfg. Co., 1 Ill. App. 78, an attorney filed a petition for fees for services rendered defendant corporation. The court had before it a fund belonging to the corporation. It was conceded that the court might, under the circumstances, hear a petition for the allowance of fees, the only question arising being whether services had actually been rendered for the corporation.

In Colley v. Wolcott, 187 Fed. 595, property had been brought into court for restoration to its rightful owner through the services of solicitors, and it was held that an allowance to them for their services could properly be made in the cause, and that in so doing the court might justify the allowance upon its own knowledge of the extent and value of the services.

Under the second contention it is argued by respondent that after a final decree the court cannot entertain a petition for allowance of fees to an attorney, since he was no longer in the case, and therefore was not a party to the proceeding. This contention is untenable for several reasons. Petitioner did not withdraw from the case; the court merely entered an order of substitution of attorneys for respondent; petitioner still represented Mary O'Brien in the main litigation. Moreover, the court expressly reserved jurisdiction in the decree to make a further order regarding the disposition of the funds in the hands of the clerk, after the determination of petitioner's claim for fees, and the cause was not completely terminated until disposition had been made of that fund.

It is undisputed that respondent selected the forum and the procedure of which she now complains, and we see no reason why the

court should not have heard and determined the controversy which she and petitioner submitted to the court. The judgment of the Superior court is affirmed.

JUDGMENT AFFIRMED.

Sullivan, P. J., and Scanlan, J., concur.

and the following information is the result. The judgment of the
committee is as follows:

• CHRYSLER TRUCKS.

40776

CHICAGO LAW PRINTING COMPANY,
a corporation,

Appellee,

v.

VILLAGE OF JUSTICE, a municipal
corporation,

Appellant.

APPEAL FROM CIRCUIT
COURT, COOK COUNTY.

302 I.A. 441²

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Chicago Law Printing Company brought suit in the Circuit court against the Village of Justice, a municipal corporation, seeking to recover the sum of \$45.04 for certain material printed and delivered by plaintiff to defendant. The cause was tried by the court without a jury, resulting in a finding and judgment in favor of plaintiff in the sum of \$45, from which defendant appeals.

The complaint consisted of two counts, one for an account stated and one in quantum valebat for goods sold and delivered. Both counts were predicated upon the sale and delivery of some letterheads and village ordinances printed and delivered to defendant, and it was alleged that defendant had promised to pay therefor the sum of \$45.04. The village answered the complaint denying "that on the dates referred to in the complaint, or at any other dates, plaintiff at the request of defendant, sold and delivered to defendant certain printing materials in the sum of \$45.04, or any other sum; denies that it promised to pay to the plaintiff the sum of \$45.04, or any other sum; denies that there is any account stated between plaintiff and defendant in the sum of \$45.04, or any other sum; *** denies there is due plaintiff the sum of \$45.04, or any other sum, from defendant."

The evidence adduced at the hearing consisted of the testimony of one witness, R. H. Hart, president of plaintiff corporation. Mr. Hart testified that in the middle of May, 1933, he was called to the

40745

CHICAGO LAW PRINTING COMPANY,
a corporation,
Appellee,
v.
VILLAGE OF JEFFERSON, a municipal
corporation,
Appellant.

APPEAL FROM CIRCUIT
COURT, COOK COUNTY.

8021A.441

MR. JUSTICE PHILLIPS DELIVERED THE OPINION OF THE COURT.

Chicago Law Printing Company brought suit in the Circuit court against the Village of Jefferson, a municipal corporation, seeking to recover the sum of \$47.04 for certain material printed and delivered by plaintiff to defendant. The cause was tried by the court without a jury, resulting in a finding and judgment in favor of plaintiff in the sum of \$47, from which defendant appeals. The complaint consisted of two counts, one for an account stated and one in quantum solvendi for goods sold and delivered.

Both counts were predicated upon the sale and delivery of some letterheads and village ordinances printed and delivered to defendant, and it was alleged that defendant had promised to pay therefor the sum of \$47.04. The village answered the complaint denying "that on the dates referred to in the complaint, or at any other dates, plaintiff at the request of defendant, sold and delivered to defendant certain printing materials in the sum of \$47.04, or any other sum; denies that it promised to pay to the plaintiff the sum of \$47.04, or any other sum; denies that there is any account stated between plaintiff and defendant in the sum of \$47.04, or any other sum; *** denies there is due plaintiff the sum of \$47.04, or any other sum, from defendant." The evidence adduced at the hearing consisted of the testimony of one witness, N. M. Hart, president of plaintiff corporation. Mr. Hart testified that in the middle of May, 1933, he was called to the

7

office of Harold Jackson, who represented himself to be the village attorney for defendant. Jackson said that he had some work to do which was to be charged to defendant, and gave Hart three documents; an ordinance providing for the licensing of undertakers; a letterhead with his name appearing as village attorney for the defendant; and a burial ordinance. Plaintiff made copies of these documents, pursuant to Jackson's request, and printed some letterheads as directed. When the work was completed it was delivered to Jackson's office. Afterward bills were made out to defendant and sent to Jackson. The evidence discloses that plaintiff had never before done any work for defendant and Hart said that he had never seen Jackson before. Upon this evidence plaintiff rested its case and no evidence was offered on behalf of defendant.

As ground for reversal it is urged that under sec. 13, article III of the Cities and Villages Act of the State of Illinois (Ill. Rev. Stat. 1937, chap. 24, par. 44), a concurrence of the majority of the trustees of the Village is necessary by ye and nay vote for the passage of any proposition entailing the expenditure or appropriation of village funds, and that in order to recover on an express or implied contract with the village it was incumbent upon plaintiff to prove, as part of its prima facie case, that such a majority vote was taken with regard to this contract. Numerous cases are cited in support of this contention, including Selby v. Village of Winfield, 255 Ill. App. 67; Arnold v. Village of Ina, 244 Ill. App. 239; Hunter, Allen & Co. v. Village of Exeter, 146 Ill. App. 90. Plaintiff does not question the plain provisions of the foregoing statute and the rule laid down by the courts of this state. It is asserted, however, that in none of these cases is there any intimation that a declaration or complaint, not alleging these facts, would fail to state a cause of action, and plaintiff's counsel say that in the cases cited the question of the lack of authority of the village to spend funds was presented either by special plea or a plea of the general issue; that if it were not necessary for

office of Harold Jackson, who represented himself to be the village attorney for defendant. Jackson said that he had some work to do which was to be charged to defendant, and gave Hart three documents; an ordinance providing for the licensing of undertakers; a letterhead with his name appearing as village attorney for the defendant; and a burial ordinance. Plaintiff made copies of these documents, pursuant to Jackson's request, and printed some letterheads as directed. When the work was completed it was delivered to Jackson's office. Afterward bills were made out to defendant and sent to Jackson. The evidence discloses that plaintiff had never before done any work for defendant and Hart said that he had never seen Jackson before. Upon this evidence plaintiff rested its case and no evidence was offered on behalf of defendant.

As ground for reversal it is urged that under sec. 13, article III of the Cities and Villages Act of the State of Illinois (Ill. Rev. Stat. 1937, chap. 24, par. 44), a concurrence of the majority of the trustees of the village is necessary by and by vote for the passage of any proposition entailing the expenditure or appropriation of village funds, and that in order to remove upon express or implied contract with the village it was incumbent upon plaintiff to prove, as part of its prima facie case, that such a majority vote was taken with regard to this contract. Numerous cases are cited in support of this contention, including Belby v. Village of Elmhurst, 37 Ill. App. 2d 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

plaintiff to allege these facts in the first instance it would not be required to make proof of them in the absence of some plea putting the matter in issue; and that under sec. 40 of the Civil Practice Act (Ill. Rev. Stat., 1937, chap. 110, par. 164) pleas of the general issue no longer may be employed, and that every allegation not explicitly denied must be deemed to be admitted and plainly set forth in the answer or reply. Based upon these contentions it is argued that a general denial of the indebtedness presents no issue and that the court was justified in finding the issues and entering judgment in favor of plaintiff.

The cases cited present a rule of law that is generally well established in this state, namely, that any person dealing with a village or its agent is presumed to know the limitations upon the authority of the village or its agent, and since no showing was made by plaintiff that its contract with defendant was ever authorized by any act of the board of trustees of the defendant, or that Jackson was its authorized agent to order the printed material, we do not see how plaintiff can hope to recover.

The authorities are also uniformly to the effect that a village cannot incur contractual liability or expense without first having passed an appropriation ordinance covering the same, and a party seeking to recover on an express or implied contract with the village must prove as part of his prima facie case that such an appropriation ordinance was passed with regard to his express or implied contract. (DeKam v. City of Streator, 316 Ill. 123; May v. City of Chicago, 222 Ill. 595; People ex rel. Mulvey v. City of Chicago, 292 Ill. App. 589.)

Although it is true, as plaintiff contends, that under sec. 40 (1) of the civil practice act the plea of general issue is prohibited, and that the defendant's answer must contain an explicit admission or denial of each allegation of the pleading to which it relates, we think the defendant's answer in the case at bar was a sufficient compliance with the statute, for the following reasons:

PLAINTIFF IS ALIQUOT THEREIN IN THE FIRST INSTANCE IT WOULD NOT
BE REQUIRED TO SET FORTH OF THE ALIQUOT OF THE FIRST INSTANCE
THE MATTER IN ISSUE; AND THAT UNDER SEC. 40 OF THE CIVIL PRACTICE ACT
(ILL. REV. STAT., 1937, CHAP. 110, PAR. 164) PLAINIFFS OF THE GENERAL
ISSUE NO LONGER MAY BE EMPLOYED, AND THAT EVERY ALLEGATION NOT
EXPLICITLY DENIED MUST BE DEEMED TO BE ADMITTED AND PLAINIFF SET FORTH
IN THE ANSWER OR REPLY. THAT THE ALLEGATION IS IN THE ANSWER
THAT A GENERAL DENIAL OF THE INDUBITABLENESS PRESENTS NO ISSUE AND THAT
THE COURT WAS JUSTIFIED IN FINDING THE ISSUE AND ENTERING JUDGMENT
IN FAVOR OF PLAINTIFF.

THE CASES CITED PRESENT A RULE OF LAW THAT IS GENERALLY WELL
ESTABLISHED IN THIS STATE, NAMELY, THAT ANY PERSON DEALING WITH A
VILLAGE OR ITS AGENT IS PRESUMED TO KNOW THE LIMITATIONS UPON THE
AUTHORITY OF THE VILLAGE OR ITS AGENT, AND SINCE NO SHOWING WAS MADE
BY PLAINTIFF THAT ITS CONTRACT WITH DEFENDANT WAS EVER AUTHORIZED BY
ANY ACT OF THE BOARD OF TRUSTEES OF THE DEFENDANT, OR THAT JACKSON
WAS ITS AUTHORIZED AGENT TO ORDER THE PRINTED MATERIAL, WE DO NOT
SEE HOW PLAINTIFF CAN HOPE TO RECOVER.

THE AUTHORITIES ARE ALSO UNIFORMLY TO THE EFFECT THAT A
VILLAGE CANNOT INCUR CONTRACTUAL LIABILITY OR EXPENSE WITHOUT FIRST
HAVING PASSED AN APPROPRIATE ORDINANCE COVERING THE SAME, AND A
COURT TENDING TO REMOVAL ON AN EXPENSE OR LIABILITY CONTRACT WITH THE
VILLAGE MUST PROVE AS PART OF ITS PRIMA FACIE CASE THAT SUCH AN
APPROPRIATE ORDINANCE WAS PASSED WITH REGARD TO THE EXPENSE OR
IMPLIED CONTRACT. (Dolan v. City of Breator, 316 Ill. 123; May v.
City of Chicago, 222 Ill. 792; People ex rel. Harvey v. City of
Chicago, 292 Ill. App. 389.)

ALTHOUGH IT IS TRUE, AS PLAINTIFF CONTENDS, THAT UNDER SEC.
40 (1) OF THE CIVIL PRACTICE ACT THE PLAINTIFFS MUST IN AN
ANSWER MUST CONTAIN AN EXPLICIT
ADMISSION OR DENIAL OF EACH ALLEGATION OF THE PLAINTIFF AS SET FORTH
IN THE ANSWER, WE THINK THE DEFENDANT'S ANSWER IN THE CASE AT BAR WAS A
SUFFICIENT COMPLIANCE WITH THE STATUTE, FOR THE FOLLOWING REASONS:

Both pleadings were verified and the making of a contract was in issue under both counts. Plaintiff, by failing to prove that the contract had been authorized by yea and nay vote of defendant's board of trustees, and that the annual appropriation ordinance had provided therefor, failed to prove the necessary authority of the defendant to act, and without that there could be no contract. In Schuyler County v. Missouri Bridge Co., 256 Ill. 348, it was held in effect that an agent's authority to execute a written instrument is put in issue by a verified plea denying execution. The agent in that case purported to act for a municipal corporation. In the case at bar there is no competent evidence that Jackson was attorney for the village nor that there was any delivery to an authorized agent of the village.

It would serve no useful purpose to remand the cause for another trial, because it is manifest from Mr. Hart's testimony that money for the payment of this printing bill had never been appropriated or authorized, and it is not contended that there was a validating ordinance before the printing was ordered by Jackson. Therefore, we are impelled to hold that the judgment of the circuit court should be reversed without remanding. It is so ordered.

REVERSED WITHOUT REMANDING.

Sullivan, P. J., and Scanlan, J., concur.

Both affidavits were verified and the making of a contract was in issue under both counts. Plaintiff, by failing to prove that the contract had been authorized by her and my vote at defendant's party committee, failed to prove the necessary authority of the defendant to make, and without that there could be no contract. In Seelye County v. Seelye, 100 Ill. 348, it was held in effect that an agent's authority to execute a written instrument is not in issue by a written plea denying execution. The agent in that case purported to act for a municipal corporation. In the case at bar there is no competent evidence that Jackson was attorney for the village nor that there was any delivery to an authorized agent of the village. It would serve no useful purpose to remand the cause for further trial, because it is manifest from Mr. Hart's testimony that money for the payment of this interest will not be paid until it is authorized by the village, and it is not contended that there was a violation of ordinance before the printing was ordered by Jackson. Therefore, we are impelled to hold that the judgment of the circuit court should be reversed without remanding. It is so ordered.

REVEREND JUSTICE SEELYE.

Seelye, J., and Seelye, J., concur.

40376

VIVIAN IRENE SMETANA, a minor,
by The Live Stock National Bank
of Chicago, her guardian,
(Plaintiff) Appellee,

v.

DAVID P. BRANNIN, SR., and
DAVID P. BRANNIN, JR.,
Defendants.

APPEAL FROM SUPERIOR
COURT OF COOK COUNTY.

DAVID P. BRANNIN, JR., a minor,
by David P. Brannin, Sr., his
guardian ad litem,
(Defendant) Appellant.

302 I.A. 442

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Plaintiff, a minor, sued David P. Brannin, Jr., a minor, and David P. Brannin, Sr., in an action for damages for personal injuries. The jury returned a verdict of guilty as to Brannin, Jr., and assessed plaintiff's damages at the sum of \$15,000. By direction of the trial court the jury returned a verdict of not guilty as to Brannin, Sr., the owner of the automobile involved in the accident. In answer to a special interrogatory the jury found Brannin, Jr., guilty of wilful and wanton misconduct. Defendant Brannin, Jr., filed a written motion that the jury's answer to the special interrogatory be vacated and set aside and a motion that defendant be granted a new trial. Both motions were denied. The court found that the damages assessed, \$15,000, were excessive and suggested to plaintiff that she remit \$5,000 from the verdict. Plaintiff acted upon the court's suggestion and judgment was entered in favor of David Brannin, Sr., and against David Brannin, Jr., in the sum of \$10,000. Defendant Brannin, Jr., appeals.

The accident in question occurred between 7:30 and 8 o'clock p.m., February 19, 1937, at the intersection of Devon avenue, Courtland avenue and Talcott road, in Park Ridge, Cook county,

WILLIAM L. BRANNIN, JR., a minor,
by The Late Frank Hamilton,
of Chicago, New York,
Plaintiff,

DAVID P. BRANNIN, JR., a minor,
DAVID P. BRANNIN, JR., a minor,
Defendants.

DAVID P. BRANNIN, JR., a minor,
by David P. Brannin, Jr., his
Guardian ad litem,
(Respondent)

CHIEF OF COURT
COURT OF COOK COUNTY

802 I.A. 448

MR. JUSTICE HOWARD DELIVERED THE OPINION OF THE COURT.

Plaintiff, a minor, sued David P. Brannin, Jr., a minor,
and David P. Brannin, Jr., in an action for damages for personal
injuries. The jury returned a verdict of guilty as to Brannin,
Jr., and assessed plaintiff's damages at the sum of \$12,000. In
direction of the trial court the jury returned a verdict of not
guilty as to Brannin, Jr., the owner of the automobile involved
in the accident. In answer to a special interrogatory the jury
found Brannin, Jr., guilty of willful and wanton misconduct. Defend-
ant Brannin, Jr., filed a written motion that the jury's answer to
the special interrogatory be vacated and set aside and a motion that
defendant be granted a new trial. Both motions were denied. The
court found that the damages assessed, \$12,000, were excessive and
suggested to plaintiff that she remit \$2,000 from the verdict.
Plaintiff acted upon the court's suggestion and judgment was
entered in favor of David Brannin, Jr., and against David Brannin,
Jr., in the sum of \$10,000. Defendant Brannin, Jr., appeals.
The accident in question occurred between 7:30 and 8 o'clock
p.m., February 19, 1937, at the intersection of Devon Avenue,
Cook County, Illinois, and Talcott Road, in Park Ridge, Cook County,

Illinois. It "is a very large intersection covering six corners in Park Ridge. It has six stop and go lights." The intersection is at the outskirts of Park Ridge, in a sparsely built-up neighborhood. Devon avenue runs east and west; Courtland avenue, north and south; and Talcott road runs southeast and northwest. Devon avenue, from curb to curb, is 107 feet wide. Plaintiff and defendant were both seventeen years of age and were students at the Maine Township high school. On the evening in question plaintiff was riding a bicycle belonging to her brother. She testified that she rode her bicycle north on Courtland avenue to its intersection with Devon avenue; that the lamp on the bicycle was not lighted; that when she reached the south side of Devon avenue the traffic light on Courtland was red, and she waited, on foot, for the traffic signal to turn to green; that when the light turned green she proceeded on the crosswalk toward the north side of Devon avenue, straddling the bicycle, that is, she had one foot on the ground and one across the bar and was pushing the bicycle forward with one leg; that before she got to the other side and when she was about ten feet from the north curb she saw defendant's car coming through and she then sat on the seat of the bicycle and started to ride the bicycle in order to get across before defendant's car, coming from the east on Devon avenue, would hit her; that he was proceeding across the intersection when the Devon avenue traffic lights were red; that the lights on defendant's car were lit; that she heard no warning given; that defendant's car was going thirty miles an hour from the time it entered the intersection until it struck her; that three or four feet from the north curb the left side of the front of defendant's car hit her bicycle, throwing her twenty to twenty-five feet through the air "into the parking lot;" that she was still in the crosswalk at the time of the impact; that she was not rendered unconscious but just stunned. Witness further testified that she first saw defendant's car when she was about three-quarters of the way across Devon; that defendant's car at that time was about 150 feet east of the traffic control signal at the northeast corner;

Illinois. It is a very large intersection covering six corners in Park Ridge. It has six stop and go lights. The intersection is at the outskirts of Park Ridge, in a sparsely built-up neighborhood. Devon Avenue runs east and west; Courtland Avenue, north and south; and Talcott Road runs southeast and northwest. Devon Avenue, from curb to curb, is 107 feet wide. Plaintiff and defendant were both seventeen years of age and were students at the Maine Township High School. On the evening in question plaintiff was riding a bicycle belonging to her brother. She testified that she rode her bicycle north on Courtland Avenue to its intersection with Devon Avenue; that the lamp on the bicycle was not lighted; that when she reached the south side of Devon Avenue the traffic light on Courtland was red, and she waited, on foot, for the traffic signal to turn to green; that when the light turned green she proceeded on the crosswalk toward the north side of Devon Avenue, straddling the bicycle, that is, she had one foot on the ground and one across the bar and was pushing the bicycle forward with one leg; that before she got to the other side and when she was about ten feet from the north curb she saw defendant's car coming from the east on Devon Avenue, would hit her; that he was proceeding across the intersection when the Devon Avenue traffic lights were red; that the lights on defendant's car were lit; that she heard no warning given; that defendant's car was going thirty miles an hour from the time it entered the intersection until it struck her; that three or four feet from the north curb the left side of the front of defendant's car hit her bicycle, throwing her twenty to twenty-five feet through the air "into the parking lot"; that she was still in the crosswalk at the time of the impact; that she was not rendered unconscious was just stunned. Witness further testified that she first saw defendant's car when she was some thirty feet from the east side of Devon; that defendant's car at that time was about 150 feet east of the traffic control signal at the northeast corner;

that she watched it as it came down the street; that she continued across the street because she figured that defendant's car would stop. Defendant testified that he coasted up to the intersection with his car out of gear until the traffic signal showed green for east and west traffic; that after the light changed to green he shifted into second and passed a car driven by Glen F. Griffin at about the center of the intersection; that he was proceeding across the intersection in a slightly northwesterly direction because of a parkway in the center of Devon, west of the intersection, and also because of a jog in that part of Devon avenue; that when he was a few feet past Griffin's car he caught a glimpse of a figure on a bicycle about ten feet ahead of him and to the left of him; that he turned his car to the right and applied his brakes; that he felt something strike the left rear of his car; that the collision occurred at about the middle of the westbound traffic lane of Devon avenue, slightly east of the crosswalk; that he stopped his car in ten to fifteen feet after the impact; that the car was then five feet south of the north curb of Devon; that as he went across the intersection he was not going more than twenty miles an hour "at the top;" that when he stopped his car he and someone else assisted plaintiff into the drug store at one of the corners of the intersection.

The only witness who testified as to what took place immediately before and at the time of the impact were plaintiff and defendant. The case was close upon the facts and it is the settled law that under such a state of the evidence the record must be reasonably free from substantial and prejudicial error.

Defendant strenuously contends that he was prevented from receiving a fair trial by "prejudicial conduct of the trial judge;" and "improper closing argument of plaintiff's attorney." After a careful consideration of the instant contention in the light of the record we are constrained to find that it is a meritorious one. Defendant vigorously contested plaintiff's contention that she was permanently injured. He directs our attention to the fact that her attending

that she watched it as it came down the street; that she continued across the street because she figured that defendant's car would stop. Defendant testified that he coasted up to the intersection with his car out of gear until the traffic signal showed green for east and west traffic; that after the light changed to green he shifted into second and passed a car driven by Glen T. Griffin at about the center of the intersection; that he was proceeding across the intersection in a slightly northwesterly direction because of a pathway in the center of Devon, west of the intersection, and also because of a jog in that part of Devon Avenue; that when he was a few feet past Griffin's car he caught a glimpse of a figure on a bicycle about ten feet ahead of him and to the left of him; that he turned his car to the right and applied his brakes; that he felt something strike the left rear of his car; that the collision occurred at about the middle of the westbound traffic lane of Devon Avenue, slightly east of the crosswalk; that he stopped his car in ten to fifteen feet after the impact; that the car was then five feet south of the north end of Devon; that as he went across the intersection he was not going more than twenty miles an hour "at the top"; that when he stopped his car he and someone else walked plaintiff into the drug store at one of the corners of the intersection.

The only witness who testified as to what took place immediately before and at the time of the impact were plaintiff and defendant. The case was close upon the facts and it is the settled law that under such a state of the evidence the record must be reasonably free from substantial and prejudicial error.

Defendant strenuously contends that he was prevented from receiving a fair trial by "prejudicial" conduct of the trial judge; and "improper closing argument of plaintiff's attorney"; and a "misrepresentation of the instant contention in the light of the record was

are contended to find that it is a meritorious one. Defendant vigorously contested plaintiff's contention that she was personally injured. He directs our attention to the fact that her attending

surgeon, called by her as a witness, testified that he discharged plaintiff as cured in September, 1937, and defendant argues that the weight of the evidence sustains his position that at the time of the trial she was suffering from no permanent disability arising out of the accident. In our judgment there is force in defendant's position.

Dr. Forest A. Chandler, called as an expert by defendant, testified upon direct examination, in answer to a hypothetical question, that plaintiff was then suffering from no permanent disability arising out of the accident. During the cross-examination by plaintiff's attorney, defendant's counsel objected to one of the questions asked, upon the ground that the doctor had already answered the question. The following then took place: "The Court: The Doctor seems to be reluctant to come out with a straightforward answer yes or no. Mr. Kohn [attorney for defendant]: Well, just a minute. The Court: These questions that are being propounded are pertinent. They may be answered yes or no. That is all there is to it. Mr. Kohn: If your Honor please, I am sure that your Honor didn't intend to characterize the Doctor as not straightforward or anything of that kind. The Court: Oh, no. Mr. Kohn: Well, I ask you instruct the jury — The Court: He is like some lawyers, he just can't answer straightforward. He wants to give a hypothetical reason and explanatory and so forths which we are not interested in. We don't want a medical lecture. All we want is, is there a space evident from that picture there between the vertebra and the process, that is —" Defendant then moved for the withdrawal of a juror because of the statements of the court. The motion was denied. Prior to the court's statements counsel for plaintiff had not asked the court to direct the doctor as to how he should answer any question, and the statements by the trial court were voluntary, uncalled for, and prejudicial. Undoubtedly, a trial court has the right to direct a witness to answer directly a question propounded where the occasion calls for such direction, but in the instant case the jury could only conclude from the statements in question that

...called by her as a witness, testified that he discharged
plaintiff as cured in September, 1937, and defendant argues that
the weight of the evidence sustains his position that at the time
of the trial she was suffering from no permanent disability arising
out of the accident. In our judgment there is force in defendant's
position.

...Dr. Forest A. Gosselin, called as an expert by defendant,
testified upon direct examination, in answer to a hypothetical question,
that plaintiff was then suffering from no permanent disability arising
out of the accident. During the cross-examination by plaintiff's
attorney, defendant's counsel objected to one of the questions asked,
upon the ground that the doctor had already answered the question.
The following then took place: "The Court: The Doctor seems to be
repeating. He says that this is a hypothetical question, yes or no. Dr.
Kohn [attorney for defendant]: Well, just a minute. The Court: These
questions that are being propounded are pertinent. They may be answered
yes or no. That is all there is to it. Dr. Kohn: If your Honor
please, I am sure that your Honor didn't intend to characterize the
doctor as not straightforward or anything of that kind. The Court:
Oh, no. Dr. Kohn: Well, I ask you that the jury -- The Court:
He is like some lawyers, he just can't answer straightforward. He
wants to give a hypothetical reason and explanatory and so forth,
which we are not interested in. We don't want a medical lecture. All
we want is, is there a space evident from that picture there between
the vertebrae and the process, that is --" Defendant then moved for
the dismissal of a juror because of the statements of the court. The
motion was denied. Prior to the court's statements counsel for plaintiff
had not asked the court to direct the doctor as to how he should answer
the question, and the statements by the trial court were voluntary,
undirected, and prejudicial. Consequently, a trial court has the
right to direct a witness directly a question propounded
where the occasion calls for such direction, but in the instant case
the jury could only surmise from the statements in question that

the trial court was of the opinion that the doctor was "reluctant to come out with a straightforward answer," and they would be likely to give little, if any, weight to his testimony. How important Dr. Chandler's testimony was to defendant may be better understood from Dr. Conley's testimony, that he treated her from the time of the accident until September, 1937, at which time he discharged her as cured; and from the testimony of plaintiff's mother, that after that time no doctor treated plaintiff for her injuries.

Alice Russell, a witness for defendant, was a teacher at the Maine Township high school and knew plaintiff well. She had taught plaintiff before and after the time of the accident, and was an important witness for defendant. The accident happened on Friday, February 19, and the following Monday was a holiday. The school attendance record kept by Miss Russell was produced in court and showed that plaintiff was in school on Tuesday, Wednesday, Thursday and Friday of the week following the accident, and on Monday and Tuesday of the next week; that she was absent from March 3 to March 22 and then attended school for the four days just prior to the spring vacation; that following the spring vacation she did not return until May 24, but from that time until the close of the school year she was constantly in attendance. Miss Russell's testimony as to the apparent physical condition of plaintiff during that period also tended to support defendant's theory that plaintiff was not permanently injured. We find nothing in her testimony to indicate that she was a hostile witness to plaintiff. At one point in the direct examination she was asked to tell what plaintiff had told her in a certain conversation. The following then occurred: "The Witness: She said that it was dark and that she waited until there was a green light at the corner and started riding across on a bicycle, that the car which struck her had — she told me who was driving the car and said that the boy who was driving the car had said that he had started across, too, on a green light. She did not know how — Mr. Donaghy [attorney for plaintiff]: I object to that and ask it be stricken as not responsive. Nothing was

the trial court was of the opinion that the doctor was negligent
to some one with a "reasonable" injury, and that they would be liable
to the little, if any, weight to his testimony. How important Dr.
Hammaker's testimony was to defendant may be better understood from
Mr. Hamaker's testimony, that he treated her from the time of the
accident until September, 1937, at which time he discharged her as
cured; and from the testimony of plaintiff's mother, that after
that time no doctor treated plaintiff for her injuries.
Alice Russell, a witness for defendant, was a teacher at
the same township high school and knew plaintiff well. She had
known plaintiff before and after the time of the accident, and was
an important witness for defendant. The accident happened on Friday,
February 13, and the following Monday was a holiday. The school
attendance record kept by Miss Russell was produced in court and
showed that plaintiff was in school on Tuesday, Wednesday, Thursday
and Friday of the week following the accident, and on Monday and Tuesday
of the next week; that she was absent from March 3 to March 22 and then
attended school for the four days just prior to the spring vacation;
that following the spring vacation she did not return until May 24, but
from that time until the close of the school year she was constantly in
attendance. Miss Russell's testimony as to the apparent physical con-
dition of plaintiff during that period also tended to support defendant's
theory that plaintiff was not permanently injured. We find
nothing in her testimony to indicate that she was a hostile witness
to plaintiff. At one point in the direct examination she was asked
to tell what plaintiff had told her in a certain conversation. The
following then occurred: "The witness: She said that it was dark and
that she walked until there was a green light at the corner and starting
riding across on a bicycle, that the car which struck her was — the
boy who was driving the car and said that the boy was not driving
the car and said that he had started across, too, on a green light.
She did not know how — Mr. Donaghy [attorney for plaintiff]: I
object to that and it is irrelevant as not responsive. Nothing was

asked about what Brannin said. Mr. Kohn: She is giving the conversation. The Court: The question is what she told you. The Witness: I have never talked to Mr. Brannin about it. I am giving just exactly what she told me. The Court: Wait a minute, lady. Wait a minute. We have rules here the same as you have in the classroom. You are disregarding our rules. What we want to know is if you ever had a talk with her with reference to this accident, and if so, what did she tell you, and that is all." It will be noted that no objection had been made by plaintiff's counsel to the last answer, and that the court's rebuke to the witness was voluntary. In our opinion the rebuke was not justified. She was not a lawyer and it appears from what she said that she was only trying to make it clear that she was testifying solely as to what the plaintiff had told her. Her statement that she had never talked to defendant about the accident was not harmful to plaintiff.

Defendant complains of the conduct of the trial court during the direct examination of Dr. N. S. Zeitlin, a witness for plaintiff. The doctor was called as an X-ray expert, and defendant conceded his qualifications. The doctor then stated that he had taken some X-ray films of the plaintiff on April 12, 1937. Defendant then conceded that any pictures taken by Dr. Zeitlin were properly taken and the two X-ray films were introduced in evidence. The following then occurred: "Mr. Kohn: If it would save any time, Judge, I am perfectly willing to stipulate, so there won't be any question about it, as to the nature of the fractures shown by these X-ray plates in the beginning, and the question of healing as testified to as far as the fractures themselves are concerned, and as testified to by Dr. Challenger [X-ray specialist, witness for plaintiff] and Dr. Conley [a witness for plaintiff]. I don't think there is any question about what the X-rays show. Mr. Donaghy: Do you want to stipulate this girl is going to have this curve in her spine — Mr. Kohn: I will not. Mr. Donaghy: — permanently? Mr. Kohn: Now, now, now, be fair. The Court: That is exactly what the offer led to, certainly. Mr. Kohn: I said I will

...and the other is, ...

...The Court: The question is what she told you. The
Witness: I have never talked to Mr. Brannin about it. I am giving
just exactly what she told me. The Court: Wait a minute, lady. Wait
a minute. We have rules here the same as you have in the classroom.
You are disregarding our rules. What we want to know is if you ever
had a talk with her with reference to this accident, and if so, what
did she tell you, and that is all. It will be noted that no objection
had been made by plaintiff's counsel to the last answer, and that the
court's rebuke to the witness was voluntary. In our opinion the
rebuke was not justified. She was not a lawyer and it appears from
what she said that she was only trying to make it clear that she was
testifying solely as to what the plaintiff had told her. Her statement
that she had never talked to defendant about the accident was not
harmful to plaintiff.

Defendant complains of the conduct of the trial court during
the direct examination of Dr. M. S. Zeitlin, a witness for plaintiff.
The doctor was called as an X-ray expert, and defendant conceded his
qualifications. The doctor then stated that he had taken some X-ray
films of the plaintiff on April 12, 1937. Defendant then conceded that
any pictures taken by Dr. Zeitlin were properly taken and the two

X-ray films were introduced in evidence. The following then occurred:
Mr. Kohn: If it would save any time, Judge, I am perfectly willing
to stipulate, so there won't be any question about it, as to the nature
of the fractures shown by these X-ray plates in the beginning, and the
question of healing as testified to as far as the fractures themselves
are concerned, and as testified to by Dr. Challenger [X-ray specialist,

witness for plaintiff] and Dr. Conley [a witness for plaintiff]. I
don't think there is any question about what the X-rays show. Mr.
Donaghy: Do you want to stipulate this girl is going to have this
curve in her spine — Mr. Kohn: I will not. Mr. Donaghy: — per-
haps. Mr. Kohn: Now, now, now, be fair. The Court: That is
all right and the other is, ... Mr. Kohn: I said I will

stipulate as to the fractures. The Court: Go ahead. Let's try the case. I knew it would lead to that." There had been at this time no testimony that plaintiff had suffered any curvatures of the spine. The offer of counsel for defendant related to fractures shown by the X-ray plates and did not relate to the alleged curvature of the spine. The existence or nonexistence of the alleged permanent curvature of the spine was one of the contested issues in the case, and the statement of the court that the offer, in effect, amounted to a concession by defendant that plaintiff was going to have a permanent curvature of the spine, was unwarranted and tended to prejudice the defendant's case and his counsel with the jury. Defendant further contends that the trial court made statements prejudicial to defendant during the cross-examination of Herman H. Herzog, a witness called by defendant. Herzog was a lieutenant of police of the city of Park Ridge, and arrived at the locus in quo shortly after the accident occurred. The witness described the situation at the intersection, the lights, etc., and stated that when he arrived at the place "it was very dark at that corner." During his cross-examination the following question was asked: "Q. You wouldn't have any trouble in seeing a pedestrian at any point in that intersection if you looked into the intersection at any time that night? Mr. Kohn: There is no pedestrian involved in this case, if the Court please. * * * The Court: There is a pedestrian involved in this case, of course. The plaintiff was a pedestrian. * * * The Court: Her testimony is she had one leg over the bicycle and she was propelling herself on her feet on the ground. Later on she got on and rode it across, so she was a pedestrian. * * * Mr. Kohn: But if she is half on a bicycle and half off — The Court: That is rather splitting a hair, isn't it? * * * Mr. Kohn: I respect your Honor's ruling on the question, but I feel again that we are in a position where your Honor may have expressed an opinion as to the facts, and you are characterizing this argument as hair-splitting. The Court: Get your objection into the record, that is all that can be done about it. Mr. Kohn: Again I must ask for a mistrial. The Court: * * * Overruled." Defendant calls attention to the allegation in the

...the fracture. The Court: Go ahead. Let's try
the case. I know it would lead to that. There had been at this
time no testimony that plaintiff was without any curvature of the
spine. The offer of counsel for defendant related to fracture shown
by the X-ray plates and did not relate to the alleged curvature of the
spine. The existence or nonexistence of the alleged permanent curvature
of the spine was one of the contested issues in the case, and the state-
ment of the court that the offer, in effect, amounted to a concession
by defendant that plaintiff was going to have a permanent curvature of
the spine, was unwarranted and tended to prejudice the defendant's case
and his counsel with the jury. Defendant's further contentions that the
trial court made statements prejudicial to defendant during the cross-
examination of Herman H. Herzog, a witness called by defendant, Herzog
was a lieutenant of police of the city of Park Ridge, and arrived at
the scene in two shortly after the accident occurred. The witness
described the situation at the intersection, the light, etc., and
stated that when he arrived at the place "it was very dark at that
corner." During his cross-examination the following question was asked:
"You wouldn't have any trouble in seeing a pedestrian at any point
in that intersection if you looked into the intersection at any time
that night? Mr. Kohn: There is no pedestrian involved in this case,
is there? The Court: There is a pedestrian in-
volved in this case, or course. The plaintiff was a pedestrian.
* * * The Court: Her testimony is she had one leg over the
sidewalk and she was propelling herself on her feet on the ground.
Later on she got on and rode it across, so she was a pedestrian."
It, Kohn, say it was in fact on a bicycle and fell off -- the Court:
That is a very different matter, isn't it? * * * The Court: I respect
your honor's ruling on the question, but I feel again that we are in a
position where your honor may have expressed an opinion as to the
facts, and you are characterizing this evidence as non-evidential.
The Court: Get your objection into the record, that is all that can be
done about it. * * * Kohn: Again I must ask for a mistrial. The Court:
* * * Overruled. * * * Defendant calls attention to the allegation in the

complaint that plaintiff was riding a bicycle at the time of the accident, and to the fact that her testimony supports the allegation. We find merit in defendant's contention that the court's statements were unwarranted under the pleadings and the evidence, should not have been made, and were prejudicial to defendant and his counsel. It would unduly lengthen this opinion to recite all of the instances in the record that we think tend to show prejudicial conduct on the part of the trial court. The court frequently, instead of ruling directly upon objections made by defendant, would make statements as to what the evidence had been, and, sometimes, the effect of the same. "Where a trial court deems it necessary to state, for the benefit of the record, his understanding of the purpose and effect of testimony and his reasons for overruling the objection made, the safe and fair procedure is to call the counsel to the bar of the court and there, out of the hearing of the jury, make such statements as he deems proper, in passing upon the objection." (People v. Solomon, 261 Ill. App. 585, 601.)

At the outset of the closing argument made by plaintiff's attorney to the jury, he made the following statement: "In this case the only evidence against the father was that he owned the car, and that isn't sufficient really to hold him responsible for the acts of the child, so the only one we have in the case is David Brannin, Jr. If you should find here a verdict against Brannin, Jr., whatever amount that you find that my little client is entitled to, the question of how we get that money or where that money comes from is not within your province." The following then occurred: "Mr. Kohn: I am sorry to interrupt Mr. Donaghy. That is improper. I think it is highly improper. The Court: Yes, go ahead and get into the facts. Mr. Kohn: I move for a mistrial. The Court: Make your objections in the record. Let's go." During the voir dire examination of the jurymen the attorney for plaintiff upon several occasions touched upon the subject of casualty insurance. After the second occasion the trial court, upon objection by defendant, warned counsel for plaintiff, as follows: "The Court:

I will keep this panel, but if there is anything further that tends to make them insurance conscious, I would rather grant a new trial." Defendant strenuously contends that the statement in question was a deliberate effort to inform the jury that the defendant, a boy, was protected by insurance. We agree with the contention. The trial court, at least, should have rebuked plaintiff's attorney for the improper statement and directed the jury to disregard it, but, instead, he treated the objection and motion of defendant's counsel as not important enough to warrant a pause in the proceedings so that counsel might fairly present the reason for his objection and motion and properly make his record if the court overruled the objection and motion. As defendant argues, it is not surprising that the jury returned a verdict against defendant and assessed damages at the sum of \$15,000.

Defendant contends that the court erred in giving certain instructions for plaintiff and in refusing instructions tendered by defendant. We deem it necessary to refer only to instruction number eight given at the instance of plaintiff. It was admitted that plaintiff did not carry a lighted lamp on her bicycle at the time in question and that this was a violation of an ordinance of the city of Park Ridge; nevertheless, under instruction eight, the jury were permitted to determine from the evidence whether or not plaintiff's bicycle carried a lighted lamp and whether or not her failure in that regard, if there was a failure, was a violation of the said ordinance. The instruction ignores entirely the question as to whether or not defendant was guilty of negligence, and the concluding part of the instruction might well convey to the jury the idea that if they found that plaintiff's violation of the ordinance, "if any," did not cause or proximately contribute to bring about the accident, plaintiff might recover. The second paragraph of the instruction, in our judgment, was highly misleading. Plaintiff seeks to justify the instruction upon the ground that it is supported by the cases of Lerette v. Director General, 306 Ill. 348, and Jeneary v. C. & I. Traction Co., 306 Ill. 392. In neither of these cases did the court pass upon an instruction like the one before us. In each case the court held that an illegal

[illegible]

act to bar a recovery must have been the proximate cause of the injury. Plaintiff, in drafting instruction eight, adopted excerpts from the opinions in the two cases. Our Supreme court, on a number of occasions, has commented upon the practice of converting sentences in the opinion of the court into instructions, and has held that it is a bad practice and often leads to serious error. (See Norkevich v. Atchison, T. & S. F. Ry. Co., 263 Ill. App. 1.) The court in the Jeneary case, in laying down the rule that governed the question before them also, stated (p. 395) that the "violation of a law at the time of an accident by one connected with it is usually evidence of negligence, but there remains a question of fact whether the illegal act is the proximate cause of the injury." (Italics ours.) Counsel for plaintiff did not incorporate in instruction eight any language to the effect that the violation of the ordinance by plaintiff might be considered as evidence tending to prove negligence on her part.

Defendant strenuously contends that the damages awarded by the jury, \$15,000, were not warranted by the evidence, and resulted from prejudice caused by statements of the trial judge and the argument of the attorney, to which we have heretofore referred. There is merit in the contention.

Other errors are assigned and argued by defendant, but we deem it unnecessary to further extend this opinion.

In our opinion justice requires a retrial of the cause and the judgment of the Superior court of Cook county is reversed, and the cause is remanded.

JUDGMENT REVERSED AND CAUSE REMANDED.

Sullivan, P. J., and Friend, J., concur.

40894

JOHN E. MERRION,
(Plaintiff)

Appellant,

v.

JULIA V. O'DONNELL et al.,
(Defendants and Counterclaimants)
Appellees.

APPEAL FROM SUPERIOR
COURT OF COOK COUNTY.

302 I.A. 467

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Plaintiff appeals from a decree ordering and adjudging that the sum of \$1,316.67 and interest at the rate of five per cent per annum from September 23, 1935, also the sum of \$148.63, and \$36 as costs, a total of \$1,710.20, be credited by plaintiff on the amount still due him from defendants (counterclaimants) on a deficiency decree that had been entered in the cause. The decretal order, entered upon a counterclaim of defendants, accorded with the recommendations of the master in chancery who heard the evidence on the counterclaim.

This is the third time that the litigation between these parties has been before us. In Merrion v. O'Donnell, 288 Ill. App. 47, we state the history of the litigation up to the time of the filing of the opinion on that appeal. To quote from the opinion:

"Plaintiff filed a petition for leave to file his bill of review, which leave was granted and the complaint, in the nature of a bill of review, was filed on December 12, 1935. Defendants Julia V. O'Donnell and James P. Kiely filed a joint and several motion to dismiss the complaint, which motion was overruled, and said defendants electing to abide by their motion, a decree pro confesso was entered, from which they have appealed.

"The complaint named as defendants Julia V. O'Donnell; James W. Garvin; Margaret C. Garvin, State Bank of Chicago, a corporation, Trustee; Chicago Title & Trust Company, a corporation,

10004

JOHN E. MERRION
(Defendant)

Appellant

v.

JULIA F. O'DONNELL et al.
(Plaintiffs)

STATE OF ILLINOIS
COURT OF COMMON PLEAS

308 I.A. 468

IN THE OFFICE OF THE CLERK OF THE COURT

Plaintiff appeals from a decree ordering and adjudging that the sum of \$1,115.87 and interest at the rate of five per cent per annum from September 23, 1932, also the sum of \$148.63, and \$36 as costs, a total of \$1,710.20, be credited by plaintiff on the amount still due him from defendants (counterclaimants) on a deficiency decree that had been entered in the cause. The decretal order entered upon a counterclaim of defendants, accorded with the recommendation of the master in summary and heard the evidence on the counterclaim.

This is the third time that the litigation between these parties has been before us. In Merrion v. O'Donnell, 288 Ill. App. 47, we state the history of the litigation up to the time of the filing of the opinion on that appeal. To quote from the opinion: "Plaintiff filed a petition for leave to file his bill of review, which leave was granted and the complaint, in the nature of a bill of review, was filed on December 12, 1932. Defendants Julia F. O'Donnell and James F. Kiehl filed a joint and several motion to dismiss the complaint, which motion was overruled, and said defendants electing to abide by their motion, a decree pro confesso was entered, from which they have appealed.

"The complaint named as defendants Julia F. O'Donnell; James W. Garvin; Margaret C. Garvin, State Bank of Chicago, a corporation; Chicago Title & Trust Company, a corporation;

as Successor in Trust; Blum's Incorporated, a corporation; Estelle Lawrence Corporation, a corporation; and James P. Kiely, as trustee. James W. Garvin and Margaret C. Garvin filed a joint and several answer admitting the allegations contained in the complaint and that plaintiff was entitled to the relief prayed.

"The following facts, upon which plaintiff relies, appear from the complaint: Plaintiff was the owner and holder of a promissory note, made by Simon O'Donnell, Julia V. O'Donnell, James W. Garvin and Margaret C. Garvin, for the sum of \$25,000, dated August 21, 1925, payable five years after date with interest at six per cent per annum. The note contained a power of attorney to confess judgment against the makers in case of their default in payment, and payment of the note was secured by a trust deed on certain real estate in Cook county. Simon O'Donnell died February 7, 1927. On August 25, 1930, the surviving makers paid \$5,000 on account of the principal of the note, and interest to that date. Plaintiff entered into an agreement in writing with the surviving makers, dated August 21, 1930, by the terms of which the time for payment of the balance due upon the note, \$20,000, was extended. The surviving makers failed to make payments as provided in the extension agreement, and on March 17, 1933, plaintiff elected to and declared the amount unpaid on the note to be due and payable and on that date caused judgment by confession to be entered, in the Municipal court of Chicago, against Julia V. O'Donnell, James W. Garvin and Margaret C. Garvin for \$20,197.56. Execution issued and the bailiff of the Municipal court levied upon certain real estate owned by defendant Julia V. O'Donnell, and on May 5, 1933, sold the same for the sum of \$8,000. On April 4, 1933, plaintiff filed his bill in the Superior court of Cook county to foreclose the trust deed executed to secure the payment of the note. The cause was referred to a master in chancery to take proofs as to the amount remaining unpaid on the note and report his findings and recommendations to the court. The master found, inter alia, that the amount due and unpaid on the note was \$14,606.03, and he reported that in computing that amount he credited as a payment on the note the net

as Successor in Trust; MINN'a Incorporated, a corporation; Estelle Lawrence Corporation, a corporation; and James P. Kelly, as trustee. James W. Garvin and Margaret C. Garvin filed a joint and several answer admitting the allegations contained in the complaint and that plaintiff was entitled to the relief prayed.

"The following facts, upon which plaintiff relies, appear from the complaint: Plaintiff was the owner and holder of a promissory note, made by Simon O'Donnell, Julia V. O'Donnell, James W. Garvin and Margaret C. Garvin, for the sum of \$25,000, dated August 21, 1927, payable five years after date with interest at six per cent per annum. The note contained a power of attorney to confess judgment against the makers in case of their default in payment, and payment of the note was secured by a trust deed on certain real estate in Cook county. Simon O'Donnell died February 7, 1927. On August 25, 1930, the surviving makers paid \$5,000 on account of the principal of the note, and interest to that date. Plaintiff entered into an agreement in writing with the surviving makers, dated August 11, 1930, by the terms of which the time for payment of the balance due upon the note, \$20,000, was extended. The extension was provided for in the extension agreement, and on March 17, 1931, plaintiff elected to and received the amount unpaid on the note to be due and payable and on that date caused judgment by confession to be entered, in the Municipal Court of Chicago, against Julia V. O'Donnell, James W. Garvin and Margaret C. Garvin for \$20,127.36. Execution issued and for delivery of the Municipal Court levied upon certain real estate owned by defendant Julia V. O'Donnell, and on May 7, 1931, said law was for the sum of \$2,500. On April 1, 1932, plaintiff filed his bill in the Superior Court of Cook County to enforce the trust deed executed to secure the payment of the note. The same was referred to a master in chancery to take proofs as to the amount remaining unpaid on the note and report his findings and recommendations to the court. The master found, July 11, 1932, that the amount due and unpaid on the note was \$18,628.01, and he reported this as computing that amount as certified as a payment on the note to the

proceeds of the sale by the bailiff of the Municipal court in the proceeding in that court. No exceptions were taken to the master's report and on June 7, 1933, a decree in accordance with the master's report was entered. It provided that unless defendants or some one of them paid plaintiff, within three days, \$14,606.03 the master should sell the real estate and apply the proceeds in payment of the said amount. The master sold the real estate and made his report of sale and distribution, which showed that after applying the net proceeds of the sale in reduction of the debt there remained a deficiency of \$4,058.40. As no exceptions had been taken to that report it was approved, and on July 12, 1933, a decree was entered against defendants Julia V. O'Donnell, James W. Garvin and Margaret C. Garvin for the amount of the deficiency. On April 23, 1934, more than nine months after the final decree in the foreclosure proceedings, and more than a year after the entry of the judgment in the Municipal court, Julia V. O'Donnell filed her petition in the Municipal court praying that the judgment of March 17, 1933, be vacated on the ground that the court was without jurisdiction to enter it. Her petition was denied and she then prayed an appeal to this court, and we held, on March 29, 1935 (Merrion v. O'Donnell, 279 Ill. App. 435), that the warrant of attorney to confess judgment contained in the original note was shorn of its power and authority by the death of Simon O'Donnell, that the extension agreement contained no authority to confess judgment, and that, therefore, the Municipal court was without jurisdiction to enter the judgment by confession, and we remanded the cause to that court with directions to vacate the judgment. On June 18, 1935, the Supreme court of Illinois denied plaintiff's petition for leave to appeal, the mandate of this court was then filed in the Municipal court, and on July 8, 1935, the judgment of that court was vacated. The complaint in the instant proceeding alleges that the validity of the judgment of the Municipal court and the proceedings thereunder were not questioned prior to the entry of the final decree in the foreclosure proceedings; that

proceeds of the sale by the deficit of the Municipal court in the
accounting in that court. No exceptions were taken to the master's
report and on June 7, 1933, a decree in accordance with the master's
report was entered. It provided that unless defendants or some one of
them paid plaintiff, within three days, \$14,000.00 the master should
sell the real estate and apply the proceeds in payment of the said
amount. The master sold the real estate and made his report of sale
and distribution, which showed that after applying the net proceeds of
the sale in reduction of the debt there remained a deficiency of
\$4,928.40. As no exceptions had been taken to that report it was
approved, and on July 15, 1933, a decree was entered against defendants
Julia V. O'Donnell, James W. Garvin and Margaret C. Garvin for the
amount of the deficiency. On April 23, 1934, more than nine months
after the final decree in the foreclosure proceedings, and more than
a year after the entry of the judgment in the Municipal court, Julia V.
O'Donnell filed her petition in the Municipal court praying that the
judgment of March 17, 1933, be vacated on the ground that the court
was without jurisdiction to enter it. Her petition was denied and
she then prayed an appeal to this court, and we said, on March 23,
1935 (Ill. App. 437), that the warrant of
attorney in certain judgments contained in the original note was shown
of its power and authority by the death of Simon O'Donnell, that the
stipulation agreement contained no authority to confess judgment, and
that, therefore, the Municipal court was without jurisdiction to enter
the judgment by confession, and we remanded the cause to that court
with directions to vacate the judgment. On June 18, 1935, the Supreme
Court of Illinois denied plaintiff's petition for leave to appeal.
The mandate of this court was then filed in the Municipal court, and
on July 6, 1935, the judgment of that court was vacated. The complaint
in the instant proceeding alleges that the validity of the judgment of
the Municipal court and the proceedings thereunder were not questioned
prior to the entry of the final decree in the foreclosure proceedings;

"For the reason that the validity of said judgment of the Municipal Court and the proceedings thereunder were in no wise questioned prior to the entry of the final decree in said foreclosure proceeding, the amount credited as a payment on said note by virtue of said Bailiff's sale was considered by this Court as a payment on said note in its finding of the balance due and unpaid on said note and its finding of the deficiency remaining after the sale of said property by the Master in said foreclosure proceeding, by reason of which this Court found and decreed that after said foreclosure sale there remained a deficiency of \$4,058.40 due complainant under said decree, whereas if the amount credited as a payment under said void Bailiff's sale had not been considered by this Court as a payment this Court would have found and decreed said deficiency to be \$11,707.75, which is the true and correct amount of said deficiency.

"By reason of the fact that the term at which said final decree confirming said Master's report of sale and distribution in said foreclosure proceeding had expired before said judgment of the Municipal Court and the proceedings thereunder had been avoided, this Court thereafter was without jurisdiction to alter said decree in such manner as to show the true amount of said deficiency to be \$11,707.75, instead of \$4,058.40.

"That said decree showing said deficiency to be \$4,058.40 is binding and conclusive on complainant, and he is without remedy to alter said decree to show the correct amount of said deficiency to be \$11,707.75 except by this bill of review."

"The complaint prays that the decree in the foreclosure suit be reviewed and the correct amount due and unpaid on said note may be found and decreed and that the true and correct amount of said deficiency may be found and decreed." The decree found the facts as alleged in the complaint and decreed that the deficiency in the foreclosure proceeding is fixed at the sum of \$11,707.75.

"Appellants' motion to dismiss is as follows:

"The defendants, Julia V. O'Donnell, and James P. Kiely,

"For the reason that the validity of said judgment of the

Municipal Court and the proceedings thereunder were in no wise questioned prior to the entry of the final decree in said foreclosure proceeding, the amount credited as a payment on said note by virtue of said Belliff's sale was considered by this Court as a payment on said note in its finding of the balance due and unpaid on said note and its finding of the deficiency remaining after the sale of said property by the Master in said foreclosure proceeding, by reason of which this Court found and decreed that after said foreclosure sale there remained a deficiency of \$4,058.40 due complainant under said decree, whereas if the amount credited as a payment under said void Belliff's sale had not been considered by this Court as a payment this Court would have found and decreed said deficiency to be \$11,707.75, which is the true and correct amount of said deficiency.

"By reason of the fact that the term at which said final decree confirming said Master's report of sale and distribution in said foreclosure proceeding had expired before said judgment of the Municipal Court and the proceedings thereunder had been avoided, this Court thereafter was without jurisdiction to alter said decree in such manner as to show the true amount of said deficiency to be \$11,707.75, instead of \$4,058.40.

"That said decree showing said deficiency to be \$4,058.40 is binding and conclusive on complainant, and he is without remedy to alter said decree to show the correct amount of said deficiency to be \$11,707.75 except by this bill of review."

"The complaint prays that the decree in the foreclosure suit be reversed and the correct amount due and unpaid on said note be found and decreed and that the true and correct amount of said deficiency be found and decreed. The decree found the facts as alleged in the complaint and decreed that the deficiency in the foreclosure proceeding is fixed at the sum of \$11,707.75."

"Appellants' motion to dismiss is as follows:

"The defendants, Julia V. O'Donnell, and James P. Kelly,

move the Court to dismiss the complaint herein on the ground that:

"1. That the cause of action did not accrue within the time limited by law for the commencement of an action or suit thereon, in that the plaintiff is guilty of laches.

"2. The defendants, jointly and separately, say that the complaint and matters therein contained in manner and form as the same are therein and thereby set forth and alleged are not sufficient in law for the plaintiff to maintain his aforesaid action, and that these defendants are not bound by law to answer the same.

"Wherefore, for want of a sufficient complaint in this behalf, these defendants pray judgment and that the plaintiff may be barred from maintaining his aforesaid action."

We held that the appeal was devoid of equity and affirmed the decree of the Superior court.

After the cause was reinstated in the trial court an execution issued and was delivered to the sheriff of Cook county commanding him to make the amount of the deficiency out of the property of defendants. The sheriff then levied upon certain property, and February 25, 1937, sold parcels of real estate owned by defendant (appellee) Julia V. O'Donnell, and issued to the purchaser (plaintiff) a certificate of sale. Prior to the entry of the decree in the foreclosure suit Julia V. O'Donnell had conveyed title to all real estate owned by her to defendant (appellee) James P. Kiely, in trust, and the sheriff sold the real estate subject to any right acquired by Kiely through said conveyance.

The amended counterclaim of defendants O'Donnell and Kiely avers, in substance, as follows: "That in said foreclosure suit the plaintiff had procured the appointment by the Court [on June 24, 1933] of a receiver of the real estate sought to be foreclosed. That the receiver dispossessed a tenant who was occupying said premises and that on September 1, 1933, the plaintiff with the consent of the receiver, occupied said premises and remained in occupancy, until after the period of redemption expired and paid no rent therefor either to the receiver or the owner of the equity of redemption. Counter-claimant, James P. Kiely, as alleged

1933, the plaintiff with the consent of the receiver, occupied said premises and remained in occupancy, until after the period of redemption expired and paid no rent therefor either to the receiver or the owner of the property of redemption. Counter-claimant, James P. Kieley, as alleged

owner of the equity of redemption asks judgment against the plaintiff for use and occupancy of said premises at the rate of \$100 per month for the time plaintiff is alleged to have occupied the same." Other claims in the counterclaim were disallowed and are not involved in this appeal. The essential parts of plaintiff's answer to the counterclaim are as follows: "Admitted that in the foreclosure proceeding a writ of assistance was procured by the receiver for the purpose of dispossessing the occupant of said premises, but avers that the said occupant abandoned said premises and said writ was not served upon him. Denied that he entered into possession of said premises prior to the expiration of the period of redemption. Denied that \$100 per month was a reasonable rent for said premises."

On February 10, 1938, an escrow agreement was entered into by plaintiff, O'Donnell, Kiely, and the Chicago Title and Trust Company, as escrowee, whereby plaintiff agreed to indorse and deposit with the escrowee the certificate of sale, and defendants agreed to pay plaintiff the sum of \$2,500 in cash, and the sum of \$500 with interest on the unpaid balance on March 10, 1938, and on the 10th day of each and every month thereafter until \$11,340.63 had been paid. The decree in the instant case dismissed the amended complaint. Plaintiff states that "as the escrow agreement entered into by the plaintiff and defendants and which up to the time of the hearing had been performed, disposed of the issues raised in the complaint, the complaint was abandoned," and therefore plaintiff "presented no further evidence before the master in support thereof." Plaintiff and defendants agree that the only question presented by this appeal concerns the decretal order entered in favor of defendants on their counterclaim.

The master heard the evidence as to the counterclaim and his "conclusions and recommendations" are as follows: That

"The amended counter-claim of the defendants was filed on September 18, 1935, praying that a judgment be entered against the plaintiff for use and occupancy of the real estate involved in the foreclosure suit * * *. The Final Report and Account of * * * the

...of the equity of redemption asks judgment against the plain-
tiff for use and occupancy of said premises at the rate of \$100 per
month for the time plaintiff is alleged to have occupied the same."
Other claims in the counterclaim were disallowed and are not involved
in this appeal. The essential parts of plaintiff's answer to the
complaint are as follows: "Admitted that in the foreclosure pro-
ceeding a writ of assistance was procured by the receiver for the
purpose of disposing the occupant of said premises, but avers that
the said occupant abandoned said premises and said writ was not served
upon him. Denied that he entered into possession of said premises
prior to the expiration of the period of redemption. Denied that \$100
per month was a reasonable rent for said premises."
On February 10, 1938, an escrow agreement was entered into by
plaintiff, O'Donnell, Kieley, and the Chicago Title and Trust Company,
as escrowee, whereby plaintiff agreed to indorse and deposit with the
escrowee the certificate of sale, and defendants agreed to pay plain-
tiff the sum of \$2,700 in cash, and the sum of \$700 with interest on
the unpaid balance on March 15, 1938, and on the 15th day of each and
every month thereafter until full payment had been paid. The escrow
in the instant case admitted the unrecorded complaint. Plaintiff states
that "as the escrow agreement entered into by the plaintiff and
defendants and which up to the time of the hearing had been performed,
disposed of the issues raised in the complaint, the complaint was
abandoned," and therefore plaintiff "presented no further evidence
before the master in support thereof." Plaintiff and defendants agree
that the only question presented by this appeal concerns the master's
order entered in favor of defendants on their counterclaim.
The master heard the evidence on the counterclaim and the
"communications and recommendations" are as follows: The
"The master's decision of the defendant was filed on
September 15, 1937, stating that a judgment was entered against the
plaintiff for the use and occupancy of the real estate involved in the
foreclosure suit. The final judgment and account of the

receiver in said proceeding, was filed on September 23, 1935, and in said report said receiver represented to the Court that the plaintiff, John E. Merrion, had entered into possession of said premises in the month of September, 1933, and remained in possession thereof during the period of redemption. On the same day, said Final Report and Account of said receiver was approved and said receiver was discharged, but said order, approved by the solicitor for the complainant and the solicitors for the defendants, expressly provided that same was entered without prejudice to the rights of the owner of the equity of redemption of said property to urge as a set-off against the complainant what, if anything, the complainant should be charged for the alleged use and occupation of said premises during the period of redemption;" that

"The defendant James P. Kiely was the owner of the equity of redemption of said property from September, 1933, until the expiration of the period of redemption, and was not personally liable for the mortgage indebtedness. Any moneys collected by the receiver as rent of said property after sale should have been credited on the deficiency decree entered against the defendant Julia V. O'Donnell, or should have been paid to the owner of the equity of redemption, James P. Kiely. In the foreclosure case, * * * the Court, by its order of September 23, 1935, approved by counsel for the parties hereto, approved the Final Report and Account of the receiver and discharged the receiver, but 'without prejudice to the rights of the owner of the equity of redemption to urge as set-off against the complainant what, if anything, the complainant should be charged for the alleged use and occupation of said premises during the period of redemption;" that

"At the time of the entry of said order, the defendant James P. Kiely, as the owner of the equity of redemption in said property, had already filed his amended counter-claim in this proceeding, so I assume that the Court must have had said counter-claim in mind at the time of the entry of said order;" that

"In the statement dated November 5, 1937, submitted by Charles J. Trainor, attorney for the plaintiff, to James A. Russell as attorney

receiver in said proceeding, was filed on September 23, 1932, and in
 said report said receiver represented to the Court that the plaintiff,
 John I. Norton, had entered into possession of said premises in the
 month of September, 1932, and remained in possession thereof during
 the period of redemption. On the same day, said Final Report and Account
 of said receiver was approved and said receiver was discharged, but said
 order, approved by the solicitor for the complainant and the solicitors
 for the defendant, expressly provided that said receiver should
 be entitled to the rights of the owner of the equity of redemption of said
 property to make as a set-off against the complainant's debt, if existing,
 the complaint should be amended for the alleged new and continuing
 said premises during the period of redemption." That

"The defendant James V. Kelly was the owner of the equity of
 redemption of said property from September, 1931, until the expiration
 of the period of redemption, and was not personally liable for the
 mortgage indebtedness, any sums collected by the receiver in redemption
 of said property from said mortgage were held on the defendant
 because entered against the defendant Julia V. O'Donnell, or should have
 been paid to the owner of the equity of redemption, James V. Kelly. In
 the foreclosure case, * * * the Court, by its order of September 23,
 1932, approved by counsel for the parties hereto, approved the Final
 Report and Account of the receiver and discharged the receiver, but
 entitled prejudice to the rights of the owner of the equity of redemption
 to make as set-off against the complainant's debt, if existing, the
 complainant should be charged for the alleged new and continuing
 interest during the period of redemption." That

"At the time of the entry of said order, the defendant James V.
 Kelly, as the owner of the equity of redemption in said property, had
 already filed his amended counter-claim in this proceeding, so I assume
 that the Court must have had said counter-claim in mind at the time of
 the entry of said order." That

"In the defendant's amended account of 1932, submitted by counsel
 for the defendant, attention is called to the fact that the defendant

for Julia V. O'Donnell and James P. Kiely, the amount shown therein is the moneys represented by the plaintiff as the amount necessary to redeem from said foreclosure sale;" that

"In the escrow agreement entered into on February 10, 1938, at the Chicago Title and Trust Company, no mention is made of the pending counter-claim of the defendants, and there is no provision in said agreement that the amount to be paid by the defendants includes any settlement of the question of the payment by the plaintiff of any rent during the period of redemption. No evidence was introduced that the issues raised by said counter-claim were considered or raised in connection with said escrow agreement. Therefore, the question of the obligation of the plaintiff to pay rent for said premises during said period of redemption must be determined without considering the terms of said escrow agreement;" that

"It appears from the petition of the plaintiff, which was filed on June 24, 1933 in the foreclosure proceedings * * *, asking for the appointment of a receiver, that the reasonable rental value of the property in question was One Hundred Dollars per month; it also appears from the petition filed by the receiver in said proceedings on July 26, 1933, that the reasonable rental value of said premises was One Hundred Dollars per month, and in said petition said receiver represented that he had been offered One Hundred Dollars per month as rent and that the tenant in possession at that time would not pay in excess of Thirty-Five Dollars per month, and, on said representation, a writ of assistance was issued to put said receiver in possession and said tenant out of possession of said premises;" that

"In view of the fact that said receiver was appointed upon the petition of the plaintiff, John E. Merrion, and the receiver was subsequently discharged, leaving the question of rent as between the plaintiff and the owner of the equity of redemption still to be determined, and in view of the fact that the plaintiff did take possession of said premises during the month of September, 1933, and

for Julia V. O'Donnell and James P. Kelly, the amount shown therein is

the money represented by the plaintiff as the amount necessary to

redeem from said foreclosure sale; that

"In the escrow agreement entered into on February 10, 1936,

of the Chicago Title and Trust Company, no mention is made of the

pending counter-claim of the defendants, and there is no provision in

said agreement that the amount to be paid by the defendants includes

any settlement of the question of the payment by the plaintiff of any

rent during the period of redemption. The payment was intended that

the issues raised by said counter-claim were considered or raised in

connection with said escrow agreement. Therefore, the question of the

obligation of the plaintiff to pay rent for said premises during said

period of redemption must be determined without considering the terms

of said escrow agreement; that

"It appears from the petition of the plaintiff, which was

filed on June 24, 1933 in the foreclosure proceedings * * *, asking

for the appointment of a receiver, that the reasonable rental value

of the property in question was one hundred dollars per month; it

also appears from the petition filed by the receiver in said proceed-

ings on July 20, 1933, that the reasonable rental value of said

premises was one hundred dollars per month, and in said petition said

receiver represented that he had been offered one hundred dollars per

month as rent and that the amount in possession at that time would

not pay in excess of thirty-five dollars per month, and, on said

representation, a writ of assistance was issued to put said receiver

in possession and said tenant out of possession of said premises;

that

"In view of the fact that said receiver was appointed upon

the petition of the plaintiff, John E. Morrison, and the receiver was

independently discharged, leaving the question of rent as between the

plaintiff and the owner of the equity of redemption still to be

determined, and in view of the fact that the plaintiff has

been in possession of said premises during the month of September, 1933, and

did remain therein during the entire period of redemption after the tenant, who was paying rent, was forced to vacate said premises, it is my opinion that the plaintiff, John E. Merrion, in equity, should be charged for the use and occupation of said premises from September, 1933, until October 5, 1934, the date of the expiration of the period of redemption from the sale held in said foreclosure proceedings. According to the plaintiff's own sworn petition and also the sworn petition of the receiver appointed on the petition of the plaintiff in said foreclosure suit, the reasonable rental value of said premises was One Hundred Dollars per month;" that

"Therefore, the master recommends that a decree be entered herein finding that there is due to the defendant James P. Kiely, from the plaintiff, John E. Merrion, the sum of Thirteen Hundred Sixteen and 67/100ths Dollars and interest at the rate of five per centum per annum from September 23, 1935, the date of the approval of the Final Report and Account of the receiver * * *, same being for rent of the premises in question, at the rate of One Hundred Dollars per month, for the period commencing September, 1933 and expiring October 5, 1934, together with interest thereon, as aforesaid;" that

"The master recommends that said decree provide that said amount be credited by said plaintiff on the amount still due said plaintiff from the defendants on the balance due on the deficiency decree entered * * * and referred to in the escrow agreement dated February 10, 1938, above referred to, or, that, in the alternative, a judgment be entered for said amount, on said finding, in favor of the defendant James P. Kiely, against the plaintiff, John E. Merrion."

The decree follows the recommendations of the master, and "ordered, adjudged and decreed that the sum of \$1,316.67 together with interest at the rate of 5% per annum from September 23, 1935, together with the further sum of \$148.63 and the further sum of \$36 as costs, making a total of \$1,710.20, be credited by said plaintiff, John E. Merrion, on the amount still due plaintiff, John E. Merrion, from the defendants, and counter-claimants, Julia V. O'Donnell and James P.

and remain therein during the entire period of redemption after the
sum of \$1,316.07, was found to be due to the plaintiff, it
is my opinion that the plaintiff, John M. Kerrison, in equity, should
be charged for the use and occupation of said premises from September,
1932, until October 2, 1934, the date of the expiration of the period
of redemption from the sale held in said foreclosure proceedings.
According to the plaintiff's own sworn petition and also the sworn
petition of the receiver appointed on the petition of the plaintiff
in said foreclosure suit, the reasonable rental value of said premises
was one hundred dollars per month, that
therefore, the entire redemption sum of \$1,316.07, from
herein finding that there is due to the defendant James P. Kiely, from
the plaintiff, John M. Kerrison, the sum of thirteen hundred sixteen
and 07/100ths dollars and interest at the rate of five per centum per
annum from September 23, 1932, the date of the approval of the final
report and account of the receiver * * *, same being for rent of the
premises in question, at the rate of one hundred dollars per month, for
the period commencing September, 1932 and ending October 2, 1934,
together with interest thereon, as aforesaid; that
the entire redemption sum of \$1,316.07, plus the said
amount be credited by said plaintiff on the amount still due said
plaintiff from the defendants on the balance due on the deficiency
liens entered * * * and referred to in the escrow agreement dated
February 10, 1932, above referred to, or, that, in the alternative,
a judgment be entered for said amount, on said finding, in favor of
the plaintiff, James P. Kiely, against the plaintiff, John M. Kerrison."
The decree follows the recommendations of the master, and
"ordered, adjudged and decreed that the sum of \$1,316.07 together with
interest at the rate of 5% per annum from September 23, 1932, together
with the further sum of \$148.63 and the further sum of \$38 as costs,
being a total of \$1,493.70, be credited by said plaintiff, John M.
Kerrison, on the amount still due plaintiff, John M. Kerrison, from the
defendants, and counter-claimants, Julia V. O'Donnell and James P.

Kiely, on the balance due on the deficiency decree * * * entered on February 6, 1936, and referred to in the escrow agreement dated February 10, 1938, herein set forth."

In our former opinion we found that the appeal of Julia V. O'Donnell and James P. Kiely was devoid of equity and that they were forced to rely upon alleged technical errors in support of their argument that the decree should be reversed. We find that the same criticism may be justly applied to plaintiff upon this appeal.

Several times, in plaintiff's brief, it is stated that the order of reference to the master contains no directions to take proofs upon the counterclaim. It appears from the master's report that when plaintiff abandoned his complaint because of the escrow agreement, the master called for hearing defendants' counterclaim. Plaintiff's counsel made no objection to the master's hearing the same; cross-examined counterclaimants' witnesses; introduced evidence on behalf of plaintiff; filed objections to the master's report, none of which raised the point that the order did not contain directions to the master to take proofs upon the counterclaim; and appeared before the trial court and argued the objections. Plaintiff is therefore in no position to raise any point as to the failure of the order to contain directions to the master to take proofs upon the counterclaim.

Plaintiff contends that the statement of account submitted to defendants by plaintiff was a complete statement of the amounts due each to the other growing out of the foreclosure proceedings, was accepted by defendants as correct, and that the escrow agreement finally settles and adjusts all claims and accounts between plaintiff and defendants. The master found against this contention of plaintiff, and we agree with his findings and conclusions in reference thereto.

Plaintiff contends that "The appointment of plaintiff by the receiver as a custodian to care for the premises, did not create the relation of landlord and tenant between the receiver and plaintiff; and unless such relation existed either by express or implied contract, the plaintiff cannot be held liable for rent. The uncontradicted evi-

February 10, 1938, herein set forth.

In our former opinion we found that the appeal of July 1, 1938, was timely and that the master's report was correct. We find that the same argument may be justly applied to plaintiff upon this appeal.

Several times, in plaintiff's brief, it is stated that the order of reference to the master contains no directions to take proofs upon the counterclaim. It appears from the master's report that when plaintiff requested his examination of the master's report, the master called for plaintiff's counterclaim. Plaintiff's counsel made no objection to the master's having the same; and plaintiff's counsel introduced evidence on behalf of plaintiff. Plaintiff's brief objections to the master's report, none of which raised the point that the order did not contain directions to the master to take proofs upon the counterclaim and appeared before the trial judge and argued the objections. Plaintiff is therefore in no position to raise any point as to the failure of the order to contain directions to the master to take proofs upon the counterclaim.

Plaintiff contends that the statement of account submitted to defendants by plaintiff was a complete statement of the amounts due each of the parties growing out of the foreclosure proceedings, was accepted by defendants as correct, and that the set-off agreement finally settles and adjusts all claims and accounts between plaintiff and defendants. The master found against this contention of plaintiff, and we agree with his findings and conclusions in reference thereto.

Plaintiff contends that "The appointment of plaintiff as receiver as a condition to care for the premises, did not create the relation of landlord and tenant between the receiver and plaintiff; and unless such relation existed plaintiff is entitled to the same treatment as the plaintiff cannot be held liable for rent. The undisputed ev-

dence was that plaintiff occupied one room in the house, and remained there as a custodian. There was no evidence whatever which tended to show the reasonable value of the use of that room, even if plaintiff could be charged rent as a tenant. During the time plaintiff is alleged to have occupied the premises, they were in the possession and control of the receiver under order of Court. The receiver was an officer of the Court, not an agent of either plaintiff or counter-claimants, and under whatever circumstances plaintiff occupied the room in the house, whether as custodian or tenant, there was no privity between him and counter-claimants. If plaintiff was obligated to pay rent as an occupant, his obligation was to the receiver not to counter-claimants. If the receiver negligently failed to perform his duties, whereby income from the premises was lost, to the damage of counter-claimants or either of them, the receiver is responsible, not the plaintiff." The counterclaimants contend that "The fact is, and the record sufficiently establishes it, that the entry into the premises by plaintiff was the result of a well laid plan with only one obstacle in its way. The premises were occupied by a tenant who was paying rent. A plan had to be concocted to remove the tenant. Accordingly, plaintiff petitioned for the appointment of a receiver, and the receiver through plaintiff's attorney asked for a rule upon the present tenant to show cause why a writ of assistance should not issue. When the writ issued the premises were vacant, and plaintiff, who was the mortgagee, went into possession, and personally occupied the premises from September, 1933, until the issuance of the Master's deed. By his act he intervened in the right of the defendants to have the rents applied to the reduction of the deficiency, and the Master and the Court rightfully held that he is chargeable with the use and occupation of said premises."

The receiver was appointed on June 24, 1933. At that time there was a tenant, Wagner, in possession of the premises who was paying \$35 a month rent. On July 26, 1933, plaintiff's attorney presented to the court a verified petition of the receiver, which set up that the property consisted of "a dwelling house, barns, out-buildings and approximately

fifty three acres of land on the River Road, near Wheeling, in Cook County, Illinois; that at the time the mortgage in question was given, the said premises sold for Fifty Thousand Dollars, and that at the present time said premises are conservatively worth, in the opinion of your petitioner, not less than Twenty Thousand Dollars. Your petitioner further represents that one James Wagner is in possession of said premises under an oral lease with the defendant Julia V. O'Donnell; that he originally agreed to pay as rent for said premises the sum of One Hundred Dollars a month, but has been reducing said rent from month to month until at the present time he is paying merely Thirty Five Dollars a month. * * * That when the property was sold, he is informed and believes and states as true, the samewas well stocked with all kinds of up-to-date farming implements and machinery, but since said premises were sold on August 21, 1925, the said farm, nor any part of it, has been tilled, but has been allowed to run to weeds, and the machinery has been allowed to become rusted and rotten, and has not even been kept in the buildings intended for the housing thereof, until at the present time there is no machinery upon said premises of any kind that can be used for farming purposes. * * * That he called upon the said tenant, James Wagner, and served upon him a certified copy of the decree appointing your petitioner as receiver, and informed the said James Wagner that he would have to pay rent in a sum which reasonably represented the rental value of the premises, and in a sum which would equal what your petitioner could obtain from others for the use and occupation of said premises. * * * Shows to the court that said James Wagner entered into possession of said premises under Julia V. O'Donnell, defendant, long after the trust deed, being foreclosed herein, was executed. * * * That the said James Wagner stated that he would not pay for the use and occupation of said premises any sum in excess of Thirty Five Dollars a month. * * * Represents to the court that the said James Wagner has, within the last ninety days, installed in the residence upon said building a saloon, consisting of a fully equipped bar and fixtures. * * * That he [petitioner] has been

... three acres of land on the River Road, near Wheeling, in Cook
County, Illinois; that at the time the mortgage in question was given,
the said premises sold for Fifty Thousand Dollars, and that at the
present time said premises are conservatively worth, in the opinion
of your petitioner, not less than Twenty Thousand Dollars. Your
petitioner further represents that one James Wagner is in possession
of said premises under an oral lease with the defendant Julia V.
O'Donnell; that he originally agreed to pay as rent for said premises
the sum of One Hundred Dollars a month, but has been reducing said
rent from month to month until at the present time he is paying merely
Thirty Five Dollars a month. * * * That when the property was sold,
he is informed and believes and states as true, the same was well
stocked with all kinds of up-to-date farming implements and machinery,
but since said premises were sold on August 21, 1925, the said farm,
not any part of it, has been tilled, but has been allowed to run to
weeds, and the machinery has been allowed to become rusted and rotten,
and has not even been kept in the condition intended for the use of
the same. Until at the present time there is no machinery upon said
premises of any kind that can be used for farming purposes. * * *
That he called upon the said tenant, James Wagner, and served upon him
a certified copy of the decree appointing your petitioner as receiver,
and informed the said James Wagner that he would have to pay rent in a
sum which would equal what your petitioner could obtain from
the same for the use and occupation of said premises. * * * Shows to
the court that said James Wagner entered into possession of said premises
under Julia V. O'Donnell, defendant, long after the trust deed, being
foreclosed herein, was executed. * * * That the said James Wagner stated
that he would not pay for the use and occupation of said premises any
sum in excess of Thirty Five Dollars a month. * * * Represents to the
court that the said James Wagner has, since the last of July last,
installed in the residence upon said building a saloon, consisting of
a bar, a pool table and a billiard table. * * * That he [petitioner] has been

offered One Hundred Dollars a month as rent for said premises, and he recommends that he be permitted to execute a lease for that sum, but that he must obtain possession of said premises before such lease can be made. He, therefore, respectfully petitions the court that a rule be entered herein upon the said James Wagner, to show cause, by a short day to be fixed by the court, why a writ of assistance should not be issued against him." A rule was entered upon the tenant to show cause why a writ of assistance should not issue against him and he was served with a copy of the same. On August 8, 1933, the court issued its writ of assistance. The tenant vacated a few days before August 16 or 17, 1933, and in September, 1933, plaintiff moved into the premises. While plaintiff, in the hearing before the master, claimed that he considered himself a custodian of the premises, in his examination by his attorney the following occurred: "Q. Mr. Merrion, at the time you were put in possession out there by Mr. Carr [receiver] was there any conversation between you and Mr. Carr as to whether you should pay any rent for the property? A. No, not a word, I assumed that he wanted me to look after the place and there wouldn't be any rent. Q. Not what you assume, was that said? A. Well, I don't think we talked about it, I don't remember." The receiver did not ask the court for permission to have a custodian placed in the premises. Upon the hearing no explanation was given by the receiver as to what became of the prospective tenant who had offered him \$100 a month rent for the premises. From the receiver's testimony it appears that plaintiff's attorney also acted as attorney for the receiver. In the verified final report and account of the receiver appears the following: "He further represents to the Court that the complainant, John E. Merrion, entered into possession of said premises in the month of September, 1933 and remained in possession of said premises during the period of redemption." The order entered upon the final report contains the following significant language: "It is further ordered that this order is without prejudice to the rights of the owner of the equity of redemption to urge as set-off against the complainant what, if anything, the complainant should be charged for the alleged use and occupation of

... offered One Hundred Dollars a month as rent for said premises, and he recommended that he be permitted to execute a lease for that sum, but that he must obtain possession of said premises before such lease can be made. He, therefore, respectfully petitions the court that a rule be entered herein upon the said James Hagan, to show cause, by a short day to be fixed by the court, why a writ of assistance should not be issued against him. A rule was entered upon the tenant to show cause why a writ of assistance should not issue against him and he was served with a copy of the same. On August 1, 1933, the court issued its writ of assistance. The tenant vacated a few days before August 15 or 17, 1933, and in September, 1933, plaintiff moved into the premises. While plaintiff, in the hearing before the master, claimed that he considered himself a custodian of the premises, in his examination by his attorney the following occurred: "Q. Mr. Hagan, at the time you were put in possession out there by Mr. Gary [receiver] was there any conversation between you and Mr. Gary as to whether you should pay any rent for the property? A. No, not a word, I assumed that he wanted me to look after the place and there wouldn't be any rent. Q. Not that you assume, was that said? A. Well, I don't think we talked about it, I don't remember." The receiver did not ask the court for permission to have a custodian placed in the premises. Upon the hearing no explanation was given by the receiver as to what became of the prospective tenant who had offered him \$100 a month rent for the premises. From the receiver's testimony it appears that plaintiff's attorney also acted as attorney for the receiver. In the verified final report and account of the receiver appears the following: "He further represents to the Court that the complaint, John M. Hagan, entered into possession of said premises in the month of September, 1933 and remained in possession of said premises during the period of redemption." The order entered upon the final report contains the following significant language: "It is further ordered that this action is without prejudice to the rights of the owner of the equity of redemption to enter an affidavit against the complaint that it was obtained by fraud and to demand for the alleged and redemption of

said premises during the period of redemption." That order approved the receiver's report and account and discharged him as receiver, and bears the following on its face: "OK - Charles J. Trainor, sol. for plaintiff." As tending to show that the receiver was merely a nominal official, he states in his final report that he spent considerable time in an effort to lease the property and in looking after the same, but he waives any claim for personal disbursements made by him and asks no fee for himself; that while he consulted from time to time with the attorney for the complainant, no charge is made therefor. Why he should waive his claim against plaintiff for disbursements made by him and for his fee is not explained in the record. The receiver did not report to the court that he considered Wagner an undesirable tenant for any other reason than that he was unwilling to pay \$100 a month rent. In his statement in the petition for Wagner to show cause, he demanded of the latter that he "pay rent in a sum which reasonably represented the rental value of the premises, and in a sum which would equal what your petitioner could obtain from others for the use and occupation of said premises." In plaintiff's verified petition praying for the appointment of a receiver, petitioner avers "that the reasonable rental of said property is \$100 per month." There is much force in counterclaimants' contention that plaintiff wanted a receiver appointed as part of a plan to oust the tenant who was paying \$35 a month rent so that plaintiff might be given possession of the property. Plaintiff, through the receiver, obtained the writ of assistance against Wagner because the latter refused to pay \$100 a month rental, but now, when counterclaimants ask plaintiff to pay rent for the premises during the period of redemption, the latter contends that the premises during the period in question had no rental value. We agree with the master's conclusion that plaintiff, "in equity, should be charged for the use and occupation of said premises from September, 1933, until October 5, 1934, the date of the expiration of the period of redemption from the sale held in said foreclosure proceedings," and that plaintiff and the receiver had fixed the reasonable rental value of the premises.

was premises during the period of redemption." That order approved the receiver's report and account and discharged him as receiver, and bears the following on its face: "OK - Charles J. Wagner, sol. for plaintiff." As tending to show that the receiver was merely a nominal official, he states in his final report that he spent considerable time in an effort to lease the property and in looking after the same, but he makes no claim for payment of his fee and was not paid for himself; that while he consulted from time to time with the attorney for the complainant, no charge is made therefor. Why he should waive his claim against plaintiff for disbursements made by him and for his fee is not explained in the record. The receiver did not report to the court that he considered Wagner an undesirable tenant for any other reason than that he was unwilling to pay \$100 a month rent. In his statement in the petition for Wagner to show cause, he demanded of the latter that he "pay rent in a sum which plaintiff represented the rental value of the premises, and in a sum which would equal what plaintiff could obtain from others for the use and occupation of said premises." In plaintiff's verified petition praying for the appointment of a receiver, petitioner avers "that the reasonable rental of said property is \$100 per month." There is some fact in connection with the contention that plaintiff wanted a receiver appointed as part of a plan to oust the tenant who was paying \$35 a month rent so that plaintiff might be given possession of the property. Plaintiff, however, the receiver, obtained the writ of assistance against Wagner because the latter refused to pay \$100 a month rental, but now, when counterclaimants ask plaintiff to pay rent for the premises during the period of redemption, the latter contends that the premises during the period in question had no rental value. He agrees with the master's conclusion that plaintiff, in equity, should be charged for the use and occupation of said premises from September, 1913, until October 5, 1914, the date of the expiration of the period of redemption from the sale held in said foreclosure proceedings," and that plaintiff and the receiver had that the reasonable rental value of the premises.

From the number of highly technical points raised by plaintiff to defeat the counterclaim, it would seem that plaintiff forgets that this proceeding is in equity. Equity has fully protected the rights of plaintiff. He sold the premises in 1925 for \$50,000, receiving \$25,000 in cash and a purchase money mortgage for \$25,000, bearing interest at six per cent. The mortgage was reduced by payments to \$18,000. He received the property back at the foreclosure sale at his own bid of \$11,000, and he has collected a deficiency of \$14,339.71 in full, with interest. It would be unconscionable to allow him to occupy the premises during the period of redemption without paying any rent for the same. He who asks equity must do equity.

In Powell v. Voight, 348 Ill. 605, the court said (pp. 608, 609):

"The law seems clear that the owners of the equity of redemption are entitled to have the deficiency, where one exists, paid out of the rents and profits of the premises during the redemption period. A pledge of rents during the redemption period is not extinguished by a foreclosure and sale, and the owners of the deficiency judgment, as well as the judgment debtors, are entitled to have it satisfied out of such rents. (Prussing v. Lancaster, 234 Ill. 462.) During the redemption period the rents belong to the owner of the equity of redemption and cannot be appropriated to the purchaser at the sale, either directly or indirectly. (Davis v. Dale, 150 Ill. 239; Bogardus v. Moses, 181 id. 554; Schaepfi v. Bartholomae, 217 id. 105.) After the foreclosure sale and entry of the deficiency decree the trust deed remained in force as to the pledge of rents during the redemption period only for the purpose of satisfying the deficiency decree. First Nat. Bank v. Illinois Steel Co., 174 Ill. 140.

"In behalf of the receiver it is further urged that the provisions of the trust deed went beyond the usual provisions, in that the Voights not only promised to pay the bonds secured therein but also agreed to pay the prior encumbrances and taxes accruing subsequent to a decree of sale, and expressly agreed that the receiver should pay all principal and interest on prior encumbrances and taxes out of rents

From the number of highly technical points raised by plaintiff to show the correctness of his position, it would seem that plaintiff's position is this: proceeding as in equity, equity has fully protected the rights of plaintiff. He sold the premises in 1927 for \$70,000, receiving \$25,000 in cash and a purchase money mortgage for \$45,000, bearing interest at six per cent. The mortgage was reduced by payments to \$18,000. He received the property back at the foreclosure sale at his own bid of \$11,000, and he has collected a deficiency of \$14,339.71 in full, with interest. It would be unreasonable to allow him to occupy the premises during the period of redemption without paying any rent for the same. He who takes equity must do equity.

In Powell v. Wright, 348 Ill. 607, the court said (pp. 608,

609):

"The law seems clear that the owners of the equity of redemption are entitled to have the deficiency, where one exists, paid out of the rents and profits of the premises during the redemption period. A pledge of rents during the redemption period is not extinguished by a foreclosure sale, and the owner of the deficiency, as well as the mortgagee, are entitled to have it satisfied out of such rents. Wright v. Wright, 324 Ill. 462. During the redemption period the rents belong to the owner of the equity of redemption and cannot be appropriated to the purchaser at the sale, either directly or indirectly. Wright v. Wright, 324 Ill. 462; Wright v. Wright, 324 Ill. 462. After the foreclosure sale and entry of the deficiency decree the rents then remaining in force as to the pledge of rents during the redemption period only for the purpose of satisfying the deficiency remain. Wright v. Wright, 324 Ill. 462. In behalf of the receiver it is further urged that the provisions of the trust deed went beyond the usual provisions, in that the Wrights not only promised to pay the bonds secured therein but also agreed to pay the prior encumbrances and taxes accruing antecedent to a future sale, and expressly agreed that the receiver should pay all principal and interest on prior encumbrances and taxes out of rents

received by him not only before but after the sale. The cases cited fail to sustain this contention. A provision in a trust deed attempting to give the rents during the redemption period to the purchaser at a sale under a foreclosure decree is of no avail. (Schaeppi v. Bartholomae, *supra*; Coleman v. Mulcahey, 334 Ill. 64; Standish v. Musgrove, 223 id. 500.) The purchaser at the sale takes under the decree and not under the trust deed. (Gregory v. Suburban Realty Co., 292 Ill. 568; Standish v. Musgrove, *supra*.) Such purchaser takes the property with all its infirmities and subject to all prior liens and encumbrances. (Davis v. Dale, *supra*; Dodds v. Snyder, 44 Ill. 53.) A receiver has no authority to pay prior encumbrances or interest or taxes after sale without the sanction and authority of the court appointing him. He acts under the order of the court - not under the trust deed. (Perlman v. Marzano, 338 Ill. 109.) A receiver is an officer of the court and has only such powers as the court gives him. (Nevitt v. Woodburn, 190 Ill. 283; Bispham's Principles of Equity, (5th ed.) p. 690; 23 R. C. L. p. 2.) In the case of Stevens v. Hadfield, 196 Ill. 253, where the receiver contended that he had rightfully paid interest on a senior mortgage, and taxes, because the mortgagor had covenanted to pay them, this court said: "The fact that the defendant in error had assumed that mortgage by covenants in his deed conferred no right or duty upon the receiver to enforce the same. In other words, the receiver was an entire stranger to that covenant and had nothing whatever to do with the mortgage." (See, also, Chicago Land Bank v. McCambridge, 343 Ill. 456, 461.)

It would unduly lengthen this opinion to answer a number of the highly technical points made by plaintiff. The argument that "if plaintiff was obligated to pay rent as an occupant, his obligation was to the receiver not to counter-claimants. If the receiver negligently failed to perform his duties, whereby income from the premises was lost, to the damage of counter-claimants, or either of them, the receiver is responsible, not the plaintiff," does not, under the facts, appeal to our sense of justice. While the receiver,

[illegible]

long since discharged, was an officer of the court, it is clear from the proof that he was, in fact, an agent of plaintiff, and was used for one purpose only - to oust the tenant paying rent, and to give possession of the premises to plaintiff. It seems difficult to believe that if the receiver had fulfilled his duties as an officer of the court he would have been unable to obtain some rent from the premises during the period of redemption. In order to justify the ousting of a tenant who was paying \$35 a month rent, the receiver testified that after his appointment he learned that Wagner was a member of a gang of criminals, commonly known as the Touhy gang, and that they were conducting a saloon in the basement of the house occupied by Wagner, at a time when the sale of intoxicating liquors was prohibited. As counterclaimants argue, this is an after-thought and an effort to cloud the real issues raised by the counterclaim. In plaintiff's petition for the appointment of a receiver no mention was made that Wagner was a member of the so-called Touhy gang, and in the receiver's petition for a rule upon Wagner it appears that the receiver was representing to the court that he was willing to have Wagner as a tenant provided the latter would pay \$100 rent per month. In the petition he states that he "informed the said James Wagner that he would have to pay rent in a sum which reasonably represented the rental value of the premises, and in a sum which would equal what your petitioner could obtain from others for the use and occupation of said premises. * * * That he [petitioner] has been offered One Hundred Dollars a month as rent for said premises, and he recommends that he be permitted to execute a lease for that sum, but that he must obtain possession of said premises before such lease can be made."

The decree of the Superior court of Cook county is a just and equitable one. It is affirmed.

DECREE AFFIRMED.

Sullivan, P. J., and Friend, J., concur.

... discharged, was an officer of the court, it is clear from
the fact that he was, in fact, an agent of plaintiff, and was used for
the purpose only - to oust the tenant paying rent, and to give possession
of the premises to plaintiff. It seems difficult to believe that if the
receiver had fulfilled his duties as an officer of the court he would
have been unable to obtain some rent from the premises during the period
of redemption. In order to justify the ousting of a tenant who was paying
rent a month rent, the receiver testified that after his appointment he
learned that Wagner was a member of a gang of criminals, commonly known as
the "body gang", and that they were conducting a saloon in the basement of
the house occupied by Wagner, at a time when the sale of intoxicating
liquors was prohibited. As counterclaimants argue, this is an after-
thought and an effort to claim that James Wagner was a receiver no
claim. In plaintiff's petition for the appointment of a receiver no
mention was made that Wagner was a member of the so-called "body gang",
and in the receiver's petition for a rule upon Wagner it appears that
the receiver was representing to the court that he was willing to have
Wagner as a tenant provided the latter would pay \$100 rent per month.
In the petition he states that he "informed the said James Wagner that
he would have to pay rent in a sum which plaintiff represented the rental
value of the premises, and in a sum which would equal four per cent
times could obtain from others for the use and occupation of said
premises. * * * That he [petitioner] has been offered one hundred
dollars a month as rent for said premises, and he recommends that he be
permitted to execute a lease for that sum, but that he must obtain
possession of said premises before such lease can be made."
The answer of the defendant court of said county is a "yes" and
affirms this one. It is affirmed.

40954
40955

PEOPLE OF THE STATE OF ILLINOIS,
(Plaintiff) Defendant in Error,

v.

NATHAN FRIEDMAN,
(Defendant) Plaintiff in Error.

PEOPLE OF THE STATE OF ILLINOIS,
(Plaintiff) Defendant in Error,

v.

OSCAR H. FRIEDMAN,
(Defendant) Plaintiff in Error.

CONSOLI-
DATED.

ERROR TO
COUNTY COURT
OF COOK
COUNTY.

302 I.A. 467²

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

The aforesaid cases were consolidated for trial and defendants waived trial by jury. In a single judgment order, entered May 16, 1939, both defendants were found guilty and each was fined \$150 and \$20 costs. They have sued out this writ of error to reverse the judgment order.

The verified information against defendant Nathan Friedman, filed by leave of court, is as follows:

"1. Louise Setzke, a resident of Chicago, Illinois, in the County and the State aforesaid, in her own proper person comes now here into Court and in the name and by the authority of the People of the State of Illinois and gives the Court to be informed and understand and states the facts to be that Nathan Friedman of the County of Cook and State of Illinois aforesaid, heretofore, to-wit: on October 20, A. D. 1938, at the City of Chicago in said County of Cook, in the State of Illinois, aforesaid, not then and there possessing in full force and virtue a valid and existing license issued by the authority of the State of Illinois to practice the treatment of human ailments in any manner, did then and there on said October 20, A. D. 1938, at and within the said County of Cook, unlaw-

4077

PEOPLE OF THE STATE OF ILLINOIS
 (Plaintiff)
 v.
 (Defendant)
 PEOPLE OF THE STATE OF ILLINOIS
 (Plaintiff)
 v.
 (Defendant)
 PEOPLE OF THE STATE OF ILLINOIS
 (Plaintiff)
 v.
 (Defendant)

STATE OF ILLINOIS
 COUNTY OF COOK
 IN SENATE
 JAMES M. HARRIS
 CLERK

302 I.A. 487

THE JUDICIAL DEPARTMENT OF THE STATE OF ILLINOIS

The aforesaid cases were consolidated for trial and defendants waived trial by jury. In a single judgment order, entered May 16, 1938, both defendants were found guilty and each was fined \$150 and \$20 costs. They have sued out this writ of error to reverse the judgment order.

The verified information against defendant Nathan Friedman, filed by leave of court, is as follows:

"1. Louise Getzke, a resident of Chicago, Illinois, in the County and the State aforesaid, in her own proper person comes now here into Court and in the name and by the authority of the People of the State of Illinois and gives the Court to be informed and understand and states the facts to be that Nathan Friedman of the County of Cook and State of Illinois aforesaid, heretofore, do-act: on October 20, A. D. 1938, at the City of Chicago in said County of Cook, in the State of Illinois, aforesaid, not then and there possessing in full force and virtue a valid and existing license issued by the authority of the State of Illinois to practice the treatment of human ailments in any manner, did then and there on said October 20, A. D. 1938, at and within the said County of Cook, unlaw-

fully operate upon, profess to heal, prescribe for or otherwise treat an ailment or supposed ailment of another, to-wit: (a) did treat blisters on the arm of Louise Setzke by drawing out liquid from below the surface of the skin with a hypodermic syringe, and (b) by washing said blisters with an antiseptic solution and by applying a salve to the same.

"2. And the said Louise Setzke, in the name and by the authority of the People of the State of Illinois, as aforesaid, further informs the Court that the said Nathan Friedman, of the County of Cook, and State of Illinois aforesaid, heretofore, to-wit: on October 20, A. D. 1938, at the City of Chicago, in said County of Cook, in the State of Illinois aforesaid, not then and there possessing in full force and virtue a valid and existing license issued by the authority of the State of Illinois to practice the treatment of human ailments in any manner, did then and there on said October 20, A. D. 1938, at and within the said County of Cook, unlawfully suggest, recommend or prescribe a form of treatment for the palliation, relief or cure of a physical or mental ailment of a person with the intention of receiving therefor either directly or indirectly, a fee, gift, or compensation, to-wit: (a) did suggest treating the blisters on the arm of Louise Setzke by the drawing out of liquid from below the surface of the skin with a hypodermic syringe and (b) by washing said blisters with an antiseptic solution and the application of a salve to the same, with the intention of receiving therefor a portion of the fee of \$2.50 paid by said patient on October 18, 1938.

"All in violation of Section 24 of an Act to revise the law in relation to the practice of the treatment of human ailments for the better protection of the public health and to prescribe penalties for the violation thereof, and contrary to the Statutes in such case made and provided and against the peace and dignity of the People of the State of Illinois.

[Signed] "Louise Setzke."

The verified information against defendant Oscar H. Friedman, filed by leave of court, save count one, which was dismissed by

fully operate upon, profess to heal, prescribe for or otherwise treat an ailment or supposed ailment of another, to-wit: (a) did treat blisters on the arm of Louise Betke by drawing out liquid from below the surface of the skin with a hypodermic syringe, and (b) by washing said blisters with an antiseptic solution and by applying a salve to the same.

"2. And the said Louise Betke, in the name and by the authority of the People of the State of Illinois, as aforesaid, further informs the Court that the said Louise Betke, of the County of Cook, and State of Illinois aforesaid, heretofore, to-wit: on October 20, A. D. 1938, at the City of Chicago, in said County of Cook, in the State of Illinois aforesaid, not then and there possessing in full form and virtue a valid and existing license issued by the authority of the State of Illinois to practice the treatment of human ailments in any manner, did then and there on said October 20, A. D. 1938, at and within the said County of Cook, unlawfully, wilfully, knowingly and purposely a form of treatment for the palliation, relief or cure of a physical or mental ailment of a person with the intention of receiving therefor directly or indirectly a fee, gift or compensation, to-wit: (a) did suggest treating the blisters on the arm of Louise Betke by the drawing out of liquid from below the surface of the skin with a hypodermic syringe and (b) by washing said blisters with an antiseptic solution and the application of a salve to the same, with the intention of receiving therefor a portion of the fee of \$2.50 paid by said patient on October 18, 1938.

"All in violation of Section 24 of an Act to revise the law in relation to the practice of the treatment of human ailments for the better protection of the public health, and to prevent the practice of the violation thereof, and contrary to the Statute in such case made and provided and against the peace and dignity of the People and the State of Illinois.

[Signed] "Louise Betke."

The verified information against defendant Louise B. Betke, filed by State of Cook, was read out, which was dismissed by

agreement, is as follows:

"2. And the said Louise Setzke, in the name and by the authority of the People of the State of Illinois, as aforesaid, further informs the Court that the said Oscar H. Friedman, of the County of Cook and State of Illinois aforesaid, heretofore, to-wit: on October 18, A. D. 1938, at the City of Chicago, in said County of Cook, in the State of Illinois, aforesaid, not then and there possessing in full force and virtue a valid and existing license issued by the authority of the State of Illinois to practice the treatment of human ailments in any manner, did then and there on said October 18, A. D. 1938, at and within the said County of Cook, unlawfully operate upon, profess to heal, prescribe for or otherwise treat an ailment or supposed ailment of another, to-wit: (a) did treat the alleged bursa of Louise Setzke by applying heat to her right shoulder, arm and wrist by wrapping an electrically heated rubber hose around her right shoulder, arm and wrist, and (b) did treat the right shoulder, arm and wrist of Louise Setzke by applying heat from an electrically heated glass tube and (c) did dress and treat blisters on the arm of Louise Setzke by puncturing said blisters with a surgical knife and by applying a salve externally.

"3. And the said Louise Setzke, in the name and by the authority of the People of the State of Illinois, as aforesaid, further informs the Court that the said Oscar H. Friedman, of the County of Cook, and State of Illinois aforesaid, heretofore, to-wit: on October 18, A. D. 1938, at the City of Chicago, in said County of Cook, in the State of Illinois aforesaid, not then and there possessing in full force and virtue a valid and existing license issued by the authority of the State of Illinois to practice the treatment of human ailments in any manner, did then and there on said October 18, A. D. 1938, at and within the said County of Cook, unlawfully suggest, recommend or prescribe a form of treatment for the palliation, relief or cure of a physical or mental ailment of a person with the intention of receiving therefor either directly or indirectly, a fee, gift or

agreement, is as follows:

"2. And the said Louise Beuke, in the name and by the

authority of the People of the State of Illinois, as aforesaid,

further informs the Court that the said Oscar M. Friedman, of the

County of Cook and State of Illinois aforesaid, heretofore, to-wit:

on October 18, A. D. 1938, at the City of Chicago, in said County of

Cook, in the State of Illinois, aforesaid, not then and there

possessing in full force and virtue a valid and existing license

issued by the authority of the State of Illinois to practice the

treatment of human ailments in any manner, did then and there on said

October 18, A. D. 1938, at and within the said County of Cook, unlaw-

fully operate upon, profess to heal, prescribe for or otherwise treat

an ailment or supposed ailment of another, to-wit: (a) did treat the

alleged bruise of Louise Beuke by applying heat to her right shoulder,

arm and wrist by wrapping an electrically heated rubber hose around

her right shoulder, arm and wrist, and (b) did treat the right shoulder,

arm and wrist of Louise Beuke by applying heat from an electrically

heated glass tube and (c) did dress and treat blisters on the arm of

Louise Beuke by puncturing said blisters with a surgical knife and

by applying a saline externally.

"3. And the said Louise Beuke, in the name and by the

authority of the People of the State of Illinois, as aforesaid,

further informs the Court that the said Oscar M. Friedman, of the

County of Cook, and State of Illinois aforesaid, heretofore, to-wit:

on October 18, A. D. 1938, at the City of Chicago, in said County of

Cook, in the State of Illinois aforesaid, not then and there possessing

in full force and virtue a valid and existing license issued by the

authority of the State of Illinois to practice the treatment of human

ailments in any manner, did then and there on said October 18, A. D.

1938, at and within the said County of Cook, unlawfully suggest,

recommend or prescribe a form of treatment for the affliction, to-wit:

the use of a surgical or medical instrument of a person with the intention

of treating the said ailment or affliction, to-wit: (a) did so

compensation, to-wit: did suggest (a) the application of heat to the right shoulder, arm and wrist of Louise Setzke and the wrapping an electrically heated rubber hose around her right shoulder, arm and wrist and (b) the application of heat from an electrically heated glass tube and (c) did dress and treat blisters on the arm of Louise Setzke by puncturing said blisters with a surgical knife and by the application of a salve externally, with the intention of receiving therefor the sum of \$2.50.

"All in violation of Section 24 of An Act to Revise the law in relation to the practice of the treatment of human ailments for the better protection of the public health and to prescribe penalties for the violation thereof, and contrary to the Statutes in such case made and provided and against the peace and dignity of the People of the State of Illinois.

[Signed] "Louise Setzke."

Defendants contend that the "findings and judgments of the court below are against the overwhelming weight of the evidence." In arguing this contention defendants frequently refer to a deposition claimed by them to have been taken in a civil suit of the complaining witness against defendants, and which the trial court refused to allow in evidence. The complaining witness, Louise Setzke, a housewife, testified, in substance, that she had known both defendants for several years; that she had gone to their shoe store, located at 6443 South Halsted street, Chicago, for treatments for her feet; that she had been troubled with arthritis in her shoulder and had been treated by Dr. Oleck for that complaint; that on October 18, 1938, in company with Mrs. Elise Schinickshe went to the store of defendants and that both went into a booth with Dr. Oscar Friedman, who took a cable or hose of a machine and wrapped it around the witness's right shoulder, arm and wrist, and then started the machine, which produced heat; that the doctor then left the room and after a while the witness complained of a burning and told Mrs. Schinick to call the doctor; that he came in,

...to wit: the application of heat to the
right arm, and the application of heat to the
electrically heated rubber hose around her right shoulder, and the
wrist and (b) the application of heat from an electrically heated
glass tube and (c) the dress and breast blisters on the arm of Louise
detake by puncturing said blisters with a surgical knife and by the
application of a saline externally, with the intention of receiving
therefor the sum of \$2.50.

"All in violation of Section 14 of an Act to Revise the law
in relation to the practice of the treatment of human ailments for
the better protection of the public health and to prescribe penalties
for the violation thereof, and contrary to the statutes in such cases
made and provided and against the peace and dignity of the people of
the State of Illinois."

(Witness: "Louise Nelson")

Defendants contend that the "findings and judgments of the
court below are against the overwhelming weight of the evidence."
In arguing this contention defendants repeatedly refer to a deposition
taken by them to have been taken in a civil suit of the complaining
witness against defendants, and which the trial court refused to allow
in evidence. The complaining witness, Louise Nelson, a housewife,
testified, in substance, that she had known both defendants for several
years; that she had gone to their shoe store, located at 6443 South
Halsted street, Chicago, for treatments for her feet; that she had
been troubled with arthritis in her shoulder and had been treated by
Dr. Olesch for that complaint; that on October 15, 1936, in company with
Mrs. Elise Schindler she went to the store of defendants and that both
went into a booth with Dr. Oscar Friedman, who took a cable or hose of
a machine and wrapped it around the witness's right shoulder, and
and wrist, and then started the machine, which produced heat; that the
doctor then left the room and after a while the witness complained of
a burning and said Mrs. Schindler to call the doctor; that he came in,

looked at the arm and said it was nothing, as the machine could not burn; that he then readjusted the machine and continued the treatment for about fifteen minutes longer; that she again complained of the burning and the doctor told her "not to worry, the machine would never burn her;" that after the treatment the cable or hose was removed from her shoulder, arm and wrist; that she then removed her jacket and the doctor strapped her shoulder with adhesive tape; that she called the doctor's attention to four or five raised abrasions on her arm and forearm, which were caused by burning; that the doctor then took a knife and opened two of the blisters, put green salve on them, bandaged them with gauze, and told her to leave the gauze on for a few hours and then to remove the bandage and it would be all right; that she paid Dr. Friedman five dollars on that day; that \$2.50 of the five dollars was paid for services rendered on that day and the remainder was to be applied toward services to be rendered on October 22; that she received a receipt for the five dollars (introduced in evidence). She further testified that on October 19 she went to the office of Dr. H. T. Oleck because of the pain she was suffering from the blisters; that Dr. Oleck looked at the burns but did nothing for them and told her to go back to Dr. Friedman; that on October 20 she went to defendants' store in company with Mrs. Schinick and on that day Nathan Friedman, defendant, took her to the back rooms, where he drew out liquid from the blisters on her right arm with a hypodermic syringe, washed the burns, put green salve on them, and wrapped gauze around the arm; that Mrs. Schinick was present during this treatment by Dr. Nathan Friedman; that witness returned to the store on October 22 and Dr. Oscar H. Friedman wanted to give her another treatment but she refused to allow him to do so and asked for a refund of her payment; that the doctor returned to her two dollars of the five dollars paid to him on October 18, and gave her a receipt for three dollars, dated October 18 (introduced in evidence). She further testified that she was under Dr. Oleck's care after October 24, 1938. Upon cross-examination she testified that her relations were at all times

looked at the arm and said it was nothing, as the machine could not burn; that he then reattached the machine and continued the treatment for about fifteen minutes longer; that she again complained of the burning and the doctor told her "not to worry, the machine would never burn her"; that after the treatment the cable or hose was removed from her shoulder, arm and wrist; that she then removed her jacket and the doctor strapped her shoulder with adhesive tape; that she called the doctor's attention to four or five raised abrasions on her arm and forearm, which were caused by burning; that the doctor then took a knife and opened two of the blisters, but found no pus in them, and then with gauze, and told her to leave the gauze on for a few hours and then to remove the bandage and it would be all right; that she paid Dr. Friedman five dollars on that day; that \$1.50 of the five dollars was paid for services rendered on that day and the remainder was to be applied toward services to be rendered on October 22; that she received a receipt for the five dollars (introduced in evidence). She further testified that on October 19 she went to the office of Dr. M. T. Gluck because of the pain she was suffering from the blisters; that Dr. Gluck looked at the burns but did nothing for them and told her to go back to Dr. Friedman; that on October 20 she went to defendant's store in company with Mrs. Friedman and on that day returned to the blisters, took her to the back room, where he drew out liquid from the blisters on her right arm with a hypodermic syringe, washed the burns, but gave her no medicine, and stopped when she said "that's all"; that Friedman was present during this treatment by Dr. Nathan Friedman; that witness returned to the store on October 22 and Dr. Oscar H. Friedman wanted to give her another treatment but she refused to allow him to do so and asked for a refund of her payment; that the doctor returned to her two dollars of the five dollars paid to him on October 18, and gave her a receipt for three dollars, dated October 18 (introduced in evidence). She further testified that she was under Dr. Gluck's care after October 24, 1938. Upon cross-examination she testified that her relations were at all times

friendly and pleasant with the two defendants, that she was a plaintiff in a civil suit against them, and that they did not diagnose her ailment. Elise Schinick testified that she went with Mrs. Setzke to defendants' store on October 18, 1938, and that she was in the booth with Mrs. Setzke and Dr. Oscar Friedman when the latter treated Mrs. Setzke's arm. The witness testified as to the treatment given Mrs. Setzke by the doctor. Her testimony in that regard accords with that of Mrs. Setzke. The witness further testified that at the time of the treatment Mrs. Setzke complained to her that she was burned by the cable, and the witness notified Dr. Friedman of the complaint; that after the doctor took the cable off Mrs. Setzke's arm she saw several blisters on Mrs. Setzke's right arm, and the doctor then cut the blisters open with a knife and applied green salve to the blisters and then bandaged the arm with gauze; that she saw Mrs. Setzke pay five dollars to the doctor and receive a receipt therefor. She further testified that she went with Mrs. Setzke to the store of defendants on October 20, at which time Dr. Nathan Friedman removed the bandages on Mrs. Setzke's arm, washed the blisters with some solution, and that he used a syringe in taking out pus from the blisters on Mrs. Setzke's arm; that he then put some green salve on the blisters and wrapped Mrs. Setzke's arm with gauze. On behalf of defendants, Nathan T. Friedman testified that his "place of business is at 6443 South Halsted Street, Chicago;" that he was admitted to practice chiropody in 1931 and licensed to practice in that year; that he had known Mrs. Setzke for several years, had treated her on several occasions and had a pleasant relationship with her, and that she had recommended a number of patients to him; that in the practice of chiropody he had the right to treat feet, remove corns, bunions and calluses and to administer diathermy treatments; that at no time did he ever treat any parts of the body other than feet; that neither on October 20 nor on any other day did he remove blisters or remove pus from blisters on Mrs. Setzke's shoulders; that she asked for a refund of five dollars and he directed Dr. Oscar Friedman to give her a receipt for three

1

thoroughly and pleasant with the two defendants, that she was a plain-
tiff in a civil suit against them, and that they did not diagnose
her ailment. Elise Schinick testified that she went with Mrs. Betake
to defendants' store on October 18, 1938, and that she was in the
room with Mrs. Betake and Dr. Nathan Friedman and the latter treated
Mrs. Betake's arm. The witness testified as to the treatment given
Mrs. Betake by the doctor. Her testimony in that regard accords with
that of Mrs. Betake. The witness further testified that at the time
of the treatment Mrs. Betake complained to her that she was burned
by the cable, and the witness notified Dr. Friedman of the complaint;
that after the doctor took the cable off Mrs. Betake's arm she saw
several blisters on Mrs. Betake's right arm, and the doctor then cut
the blisters open with a knife and applied green ointment to the blisters
and then bandaged the arm with gauze; that she saw Mrs. Betake pay five
dollars to the doctor and receive a receipt therefor. She further
testified that she went with Mrs. Betake to the store of defendants on
October 20, at which time Dr. Nathan Friedman removed the bandages on
Mrs. Betake's arm, washed the blisters with some solution, and that he
used a syringe in taking out pus from the blisters on Mrs. Betake's
arm; that he then put some green ointment on the blisters and wrapped
Mrs. Betake's arm with gauze. On behalf of defendants, Nathan F.
Friedman testified that his "place of business is at 644 1/2 North
Wabash Street, Chicago;" that he was admitted to practice chiropody
in 1931 and licensed to practice in that year; that he had known Mrs.
Betake for several years, had treated her on several occasions and
had a pleasant relationship with her, and that she had recommended a
number of patients to him; that in the practice of chiropody he had
the right to treat feet, remove corns, bunions and calluses and to
administer electrical treatment; that at no time did he ever treat
any parts of the body other than feet; that neither on October 20 nor
on any other day did he remove blisters or remove pus from blisters
on Mrs. Betake's arm; that she asked for a receipt of five dollars
and he directed Dr. Nathan Friedman to give her a receipt for that

dollars and a refund of two dollars; that he did not know Mrs. Schinick and had never seen her before; that diathermy is administered to the feet in the following manner: "A felt shoe like effect fits around the foot and rubber covered insulated cable runs from the machine to the appliance fitting around the foot;" that the diathermy and short wave machine they used was in perfect order. On cross-examination he testified that his license did not permit him to treat a human arm or shoulder; that he kept a stethoscope in his store; that he did not use a hypodermic syringe on Mrs. Setzke's arm for the purpose of withdrawing fluid or pus. Mrs. Bessie Wolver testified, for defendants, that she had been a patient of the defendants for many years; that on October 18, 1938, she and Mrs. Setzke were waiting at their office; that they spoke about the condition of their feet; that Mrs. Setzke told her that she was there to receive diathermy treatments to her feet; that she did not see Mrs. Schinick; that Mrs. Setzke was alone with Dr. Friedman when she received the treatment; that she had never known or heard of the defendants' giving treatments to people other than to the feet; that she was not related to defendants. James Bardwell testified, for defendants, that he had been in their employ at the store for five or six years selling shoes; that he knew Mrs. Setzke, had seen her several times, and was on friendly terms with her; that on October 18, 1938, he was in the booth where Mrs. Setzke was treated; that he announced patients waiting for the doctor; that he had seen Mrs. Setzke on the patients' chair with appliances on her feet receiving diathermy treatments; that she said goodbye to the witness when she left, in a pleasant and satisfactory manner; that at the time Mrs. Setzke was being treated Dr. Oscar Friedman and Mrs. Setzke were the only persons present. Upon cross-examination the witness testified that his duties as a shoe salesman did not require him to remain in the front part of the store; that he knew nothing about the operation of the diathermy machines used in the store; that there were three such machines in the store and that they had cable appliances or connections. Dr. Oscar Friedman

dollars and a refund of two dollars; that he did not know Mrs. Behnisch and had never seen her before; that diathermy is administered to the foot in the following manner: "A felt shoe like effect fits around the foot and rubber covered insulated cable runs from the machine to the appliance fitting around the foot;" that the diathermy and short wave machine they used was in perfect order. On cross-examination he testified that his business did not permit him to wear a wig and he shoulder; that he kept a stethoscope in his store; that he did not use a hypodermic syringe on Mrs. Betake's arm for the purpose of withdrawing fluid or pus. Mrs. Betake's sister testified, for defendant, that she had been a patient of the defendant for many years; that on October 18, 1938, she and Mrs. Betake were waiting at their office; that they spoke about the condition of their feet; that Mrs. Betake told her that she was there to receive diathermy treatments to her feet; that she did not see Mrs. Behnisch; that Mrs. Betake was alone with Dr. Rydman when she received the treatment; that she had never known or heard of the defendant's giving treatments to people other than to the feet; that she was not related to defendant. James Barwell testified, for defendant, that he had been in their employ at the store for five or six years selling shoes; that he knew Mrs. Betake, had seen her several times, and was on friendly terms with her; that on October 18, 1938, he was in the booth where Mrs. Betake was treated; that he announced patients waiting for the doctor; that he had seen Mrs. Betake on the defendant's table with appliances on her feet receiving diathermy treatment; that she said goodbye to the witness when she left, in a pleasant and satisfactory manner; that at the time Mrs. Betake was being treated by Dr. Rydman and Mrs. Behnisch was the only person present. Upon cross-examination the witness testified that his duties as a shoe salesman did not require him to remain in the front part of the store; that he knew nothing about the operation of the diathermy machine used in the store; that there were three main machines in the store and that they had cable appliances or connections. Dr. Gust Rydman

testified that he was admitted to the practice of chiropody in 1931 and was licensed to practice in that year; that he had known Mrs. Setzke for several years; that on October 18, 1938, she came in for a treatment, at which time the witness massaged her feet, removed the calluses and bunions, and gave her a diathermy treatment; that the machine was in good working order; that never at any time did he treat any part of her body except her feet; that he never diagnosed any ailment for her and never prescribed any medication for her. On cross-examination he testified that he did not treat Mrs. Setzke's arm or shoulder or wrist on October 18; that he did not use a scalpel on her arm or shoulder on that date, nor did he then give her arm or shoulder a heat treatment; that he did not use a diathermy machine in treating her arm or shoulder; that his license does not permit him to treat a human arm or shoulder. Upon rebuttal Mrs. Setzke testified that she did not know the witness Bessie Wolver and had never seen her in defendants' store; that the witness Bardwell did not enter the booth on October 18 while she was being treated ^{by} Dr. Oscar Friedman. We have heretofore stated, in substance, the entire evidence that was given at the trial.

This case was tried by the court. We saw and heard the witnesses and was in a better position than this court to pass upon the credibility of the witnesses. Unless Mrs. Setzke and Mrs. Schinick committed perjury, defendants are guilty of the charge. The trial court believed the testimony of the witnesses for the State, and disbelieved the testimony of the witnesses for defendants, and we find nothing in the record to warrant us in reversing the judgment on the ground that defendants were not proven guilty beyond a reasonable doubt.

The defense offered in evidence what purported to be a deposition given by Mrs. Setzke in a civil suit of Louise Setzke v. Oscar H. Friedman and Nathan T. Friedman. A certification by a notary public that she took the deposition is attached to the deposition. The record does not show if the deposition was used in the civil

testified that he was admitted to the practice of chiropody in 1911 and was licensed to practice in that year; that he had known Mrs. Betaine for several years; that on October 18, 1936, she came in for a treatment; at which time the witness massaged her foot, removed the nail and nail bed, and gave her a blister treatment; that the machine was in good working order; that never at any time did he treat any part of her body except her foot; that he never diagnosed any ailment for her and never prescribed any medication for her. On cross-examination he testified that he did not treat Mrs. Betaine's arm or shoulder or wrist on October 18; that he did not use a scalpel on her arm or shoulder on that date, nor did he then give her arm or shoulder a heat treatment; that he did not use a diathermy machine in treating her arm or shoulder; that his license does not permit him to treat a human arm or shoulder. Upon rebuttal Mrs. Betaine testified that she did not know the witness Besse Woyner and had never seen her in defendants' store; that the witness Bargwell did not enter the booth on October 18 while she was being treated by Dr. Oscar Friedman. He have heretofore stated, in substance, the entire evidence that was given at the trial.

This case was tried by the court. He saw and heard the witnesses and was in a better position than this court to pass upon the credibility of the witnesses. Unless Mrs. Betaine and Mrs. Schindler committed perjury, defendants are guilty of the charge. The trial court believed the testimony of the witnesses for the State, and disbelieved the testimony of the witnesses for defendants, and we find nothing in the record to warrant us in reversing the judgment on the ground that defendants were not proven guilty beyond a reasonable doubt.

The defense offered in evidence what purports to be a deposition given at New Orleans in a civil suit of Judge Betaine v. Oscar V. Friedman and Walter L. Friedman. A certification by a notary public that the foregoing deposition is attached to the deposition. The records show that at the deposition was read in the civil

suit. It consists of seventeen typewritten pages, closely typed, and in the form of questions and answers. No statement was made by counsel for defendants at the time of the offer or thereafter as to the purpose of the offer. All that the record shows is that when the offer was made the court stated that the deposition was incompetent and therefore he would not admit it in evidence. Defendants contend that the court erred in excluding the deposition. They argue that the court's ruling "was against the elementary rule that admissions against interest are competent." No authorities are cited in defendants' brief in support of this contention. "Our statutes make no provisions for the taking of depositions in criminal cases, * * * The legislature of this State has not seen fit to provide for such a method of obtaining testimony in criminal cases, and the courts ought not indirectly to change the law by compelling prosecutors to consent to the introduction of evidence for the defendant not legally admissible. We do not recognize the existence of such power in the courts of this State." (People v. Turner, 265 Ill. 594, 596, 597.) In their reply brief defendants argue that Mrs. Setzke was the complaining witness and should be treated as the plaintiff in this case; that the deposition shows that statements made by her in the deposition were "more or less inconsistent with her testimony in the case at bar," and that therefore the entire deposition should have been admitted. In support of their contention defendants cite Miller v. The People, 216 Ill. 309, 311, where the court (three of the justices dissenting) held that admissions and statements made by the accused when he testified as a witness in his own behalf on a former trial might be proven by the State on the subsequent trial, although the accused did not testify on the last trial. It is a sufficient answer to the contention of defendants to say that the People of the State of Illinois were the plaintiff in the instant cases. "The object in naming the injured person in a criminal prosecution is for the purpose of identification and so that the accused cannot be twice tried for the same offense. (Little v. People, 157 Ill. 153.)" (People v. Jennings, 298 Ill. 286,

126
It consists of seventeen typewritten pages, closely typed, and in the form of questions and answers. No statement was made by counsel for defendants at the time of the offer or thereafter as to the purpose of the offer. All that the record shows is that when the offer was made the court stated that the deposition was incompetent and therefore he would not admit it in evidence. Defendants contend that the court erred in excluding the deposition. They argue that the court's ruling "was against the substantial rights of the defendants and interest are competent." No authorities are cited in defendants' brief in support of this contention. "Our statutes make no provision for the taking of depositions in criminal cases." The Legislature of this State has not seen fit to provide for such a method of obtaining testimony in criminal cases, and the courts ought not indirectly to change the law by compelling provisions in relation to the introduction of evidence for the defendant not legally admissible. We do not recognize the existence of such power in the courts of this State." (People v. Turner, 205 Ill. 394, 396, 397.) In their reply brief defendants argue that Mrs. Turner was the complaining witness and should be treated as the plaintiff in this case; that the deposition shows that statements made by her in the deposition were "more or less inconsistent with her testimony in the case at bar," and that therefore the entire deposition should have been admitted. In support of their contention defendants cite Miller v. The People, 210 Ill. 392, 211, where the court (three of the justices dissenting) held that statements and statements made by the accused when he testified as a witness in his own behalf on a former trial might be proven by the State on the subsequent trial, although the accused did not testify on the last trial. It is a sufficient answer to the contention of defendants to say that the People of the State of Illinois were the plaintiff in the instant case. The object in making the instant person in a criminal prosecution is for the purpose of identification and so that the accused cannot be twice tried for the same offense. (People v. Turner, 205 Ill. 394, 396, 397.)

289.) If defendants desired to impeach the testimony given by Mrs. Setzke in the present proceedings by showing that she had made contradictory statements in the civil case upon matters material to the issues in the instant case, the proper procedure was a simple one. If a witness testifies to a certain fact on direct examination, the opposite party is entitled to ask him whether he did not testify to a different fact on a former trial, thus laying the foundation for impeaching the witness. Not a single question of this character was asked Mrs. Setzke. The trial court did not err in refusing to admit in evidence the deposition.

Defendants contend that "the evil aimed at by the Medical Practice Act is the imposition by unlicensed persons by undertaking the practice of medicine upon the unsuspecting public without being licensed so to do. Where no case is made of this practicing generally upon the public, it is not a case under the statute," and defendants argue that as the evidence for the State proves the treatment of but one individual the case of the State falls. We find no merit in this contention. Neither of the informations charged that the defendant was engaged in the practice of medicine. In People v. Frankowsky, 371 Ill. 493, the evidence for the State showed that the defendant committed but one act, that of clipping the tissues of the rectum of one Smith, and it was held that the act was a surgical operation, that Frankowsky's license entitled him only to treat human ailments without operative surgery, and that "he was, therefore, guilty of violating the Medical Practice act."

Defendants contend that in each information it is charged that the defendant therein treated Louise Setzke in the manner alleged in the information without possessing a valid and existing license issued by the authority of the State "to practice the treatment of human ailments in any manner," and that when defendants testified they were licensed to practice chiropody "they could not be held under these informations;" "that under the well known rule of allegata

299.) If defendant desired to impeach the testimony given by Mrs. Betake in the present proceedings by showing that she had made contradictory statements in the civil case upon matters material to the issues in the instant case, the proper procedure was a simple one. If a witness testifies to a certain fact on direct examination, the opposite party is entitled to ask him whether he did not testify to a different fact on a former trial, thus laying the foundation for impeaching the witness. Not a single question of this character was asked Mrs. Betake. The trial court did not err in refusing to admit in evidence the deposition.

Defendants contend that "the evil aimed at by the Medical Practice Act is the imposition by unlicensed persons by undertaking the practice of medicine upon the unsuspecting public without being licensed so to do. Where no case is made of this practicing generally upon the public, it is not a case under the statute," and defendants argue that as the evidence for the State proves the treatment of but one individual the case of the State fails. We find no merit in this contention. Neither of the information charges that the defendant was engaged in the practice of medicine. In People v. Frankfort, 371 Ill. 493, the evidence for the State showed that the defendant committed but one act, that of clipping the clasp of the rectum of one Smith, and it was held that the act was a surgical operation, that Frankfort's license entitled him only to treat human ailments without operative surgery, and that "he was, therefore, guilty of violating the Medical Practice act."

Defendants contend that in each information it is charged that the defendant therein treated Louise Betake in the manner alleged in the information without possessing a valid and existing license issued by the authority of the State "to practice the treatment of human ailments in any manner," and that when defendants testified they were licensed to practice chiropody "they could not be held under these informations;" "that under the well known rule of ailments

et probata, the State, having charged that the defendants did not have a license to practice medicine 'in any manner,' the prosecutions must fail, by reason of the fact that the evidence does not support the informations." This contention is plainly an afterthought. It was not raised or suggested in the trial court. Defendants were tried under informations, and the State had the right, if it deemed it necessary, to have the informations amended at any time during the trial. The allegations in each information were sufficient to notify the accused of the charge he was to meet so as to enable him to prepare his defense. The record shows that each of the defendants understood the charge made against him and met the evidence introduced by the State in support of the charge with evidence to the effect that he had not treated the complaining witness in any part of her body other than her feet. Furthermore, each information was sufficiently clear to enable the defendant to plead the judgment in bar in case he was subsequently prosecuted for the same offense. The burden of proving a proper license rests upon a defendant. (See People v. Frankowsky, supra, p. 495.) The information against defendant Nathan Friedman charges that he "did then and there * * * unlawfully operate upon, profess to heal, prescribe for or otherwise treat an ailment or supposed ailment of another, to-wit: (a) did treat blisters on the arm of Louise Setzke by drawing out liquid from below the surface of the skin with a hypodermic syringe, and (b) by washing said blisters with an antiseptic solution and by applying a salve to the same." The information against defendant Oscar H. Friedman charges that he "did then and there * * * unlawfully operate upon, profess to heal, prescribe for or otherwise treat an ailment or supposed ailment of another, to-wit: (a) did treat the alleged bursa of Louise Setzke by applying heat to her right shoulder, arm and wrist by wrapping an electrically heated rubber hose around her right shoulder, arm and wrist, and (b) did treat the right shoulder, arm and wrist of Louise Setzke by applying heat from an electrically heated glass

of proper, the State, having charged that the defendants did not have a license to practice medicine "in any manner," the prosecution must fail, by reason of the fact that the evidence does not support the information. This contention is plainly an afterthought. It was not raised or suggested in the trial court. Defendants were tried under information, and the State had the right, if it deemed it necessary, to have the information amended at any time during the trial. The allegations in each information were sufficient to notify the accused of the charge he was to meet so as to enable him to prepare his defense. The record shows that each of the defendants understood the charge made against him and met the evidence introduced by the State in support of the charge with evidence on his stand that he had not treated the complaining witness in any part of her body other than her feet. Furthermore, each information was sufficiently clear to enable the defendant to plead his defense in her case as was abundantly proved for the same offense. The burden of proving a proper license rests upon a defendant. (See People v. Frankfort, supra, p. 497.) The information against defendant Nathan Friedman charges that he "did then and there * * * unlawfully operate upon, profess to heal, prescribe for or otherwise treat an ailment or supposed ailment of another, to-wit: (a) did treat blisters on the arm of Louise Setake by drawing out liquid from below the surface of the skin with a hypodermic syringe, and (b) by washing said blisters with an antiseptic solution and by applying a ointment to the same." The information against defendant David E. Friedman charges that he "did then and there * * * unlawfully operate upon, profess to heal, prescribe for or otherwise treat an ailment or supposed ailment of another, to-wit: (a) did treat the alleged burns of Louise Setake by applying heat to her right shoulder, and (b) did treat by wrapping an electrically heated rubber hose around her right shoulder, and (c) did treat her right shoulder, arm and wrist by Louise Setake by applying heat from an electrically heated glass

tube and (c) did dress and treat blisters on the arm of Louise Setzke by puncturing said blisters with a surgical knife and by applying a salve externally." The evidence for the State supported these charges. The fact that each defendant possessed a license to practice chiropody was not a defense to said charges. The point made by defendants amounts to this: That when each of the defendants testified that he had a license to practice chiropody such evidence created a material variance between the allegations of the information and the proof. No such point was made or suggested in the trial court, and it cannot be raised here for the first time. "The indictment in the case charges that plaintiff in error broke into Gustave Youngstadt's store and feloniously and burglariously stole therefrom certain property belonging to Gustave Youngstadt. The evidence shows that Gus Youngstadt's tailor shop was broken into and some property of Gus Youngstadt stolen. It is insisted that the cause should be reversed because of material variance between the indictment and the proof as to the first name of Youngstadt, and also in the material variance as to the burglary being shown by the evidence to have been committed in the tailor shop of Youngstadt instead of in his store. Neither of these questions appears to have been raised in the trial court, and it has long been the ruling of this court that in such case such questions cannot be first raised in this court. (Dyer v. People, 84 Ill. 624; People v. Weisman, 296 id. 156.) Furthermore, it clearly appears that plaintiff in error was not misled or materially injured by the alleged variance, and for that reason, also, the question of variance cannot be first raised here. People v. Weisman, supra; People v. Jennings, 298 Ill. 286." (People v. Ascey, 304 Ill. 404, 405. Other cases to the same effect might be cited.) From what we have said we must not be understood as holding that the informations would not be sufficient to sustain the judgment entered if defendants had raised the question of the alleged variance during the trial.

When the facts of this case are considered, it appears to us that the trial court was very lenient in the punishment inflicted

... (c) did dress and went upstairs on the day of the ...
... The evidence for the State supported these ...
... The fact that each defendant possessed a license to practice ...
... was not a defense to said charges. The point made by defendant ...
... amounts to this: That when each of the defendants testified that ...
... he had a license to practice chiropody such evidence created a material ...
... variance between the allegations of the information and the proof. No ...
... such point was made or suggested in the trial court, and it cannot be ...
... raised here for the first time. The indictment in the case charges ...
... that plaintiff in error broke into Gustave Youngstadt's store and ...
... unlawfully and fraudulently stole certain property belonging ...
... to Gustave Youngstadt. The evidence shows that the Youngstadt's ...
... shop was broken into and some property of the Youngstadt's stolen. It is ...
... admitted that the same could be proved by means of material evidence ...
... between the indictment and the proof as to the first name of Youngstadt, ...
... and also in the material variance as to the burglary being committed by the ...
... evidence to have been committed in the tailor shop of Youngstadt instead ...
... of in his store. Neither of these questions appears to have been raised ...
... in the trial court, and it has long been the ruling of this court that ...
... in such cases such questions cannot be first raised in this court. (See ...
... v. People, 33 Ill. 2d 441; People v. Young, 104 Ill. 2d 441; People v. ...
... It clearly appears that plaintiff in error was not aided or substantially ...
... injured by the alleged variance, and for that reason, also, the question ...
... of variance cannot be first raised here. (People v. Young, 104 Ill. 2d ...
... People v. Young, 104 Ill. 2d 441; People v. Young, 104 Ill. 2d 441.) ...
... 40). Other cases to the same effect might be cited. From what we have ...
... said we must not be understood as holding that the information would ...
... not be sufficient to sustain the judgment entered if defendant had ...
... raised the question of the alleged variance during the trial. ...
... That the facts of this case are undisputed, it appears to ...
... us that the trial court was very correct in the judgment rendered.

-13-

upon the defendants.

The judgment order of the County court of Cook county entered May 16, 1939, is affirmed.

JUDGMENT ORDER AFFIRMED.

Sullivan, P. J., and Friend, J., concur.

1990-1991

The defendant denies the same, and will be valued accordingly, will

united and 1934

CONFIDENTIAL - EYES ONLY

William, P. J., and Friends, J. J. Connor,

40689

WILLIAM PHILMORE,

Appellee,

v.

OTTO H. STEIN,

Appellant.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

302 I.A. 480

MR. PRESIDING JUSTICE DENIS E. SULLIVAN DELIVERED THE
OPINION OF THE COURT.

Defendant brings this appeal seeking to reverse a judgment for \$1,000.00, subject to a lien for \$20.01 in favor of the United States Fidelity and Guaranty Company, entered on the verdict of a jury in the Superior Court in favor of plaintiff William Philmore for injuries alleged to have been sustained by him as well as property damage to the automobile he was driving when defendant's automobile collided with it on April 26, 1937, through the negligence, as alleged by plaintiff, of defendant in the operation of his automobile.

The complaint consists of four counts and alleges in substance that on April 26, 1937, while plaintiff was driving his automobile and in the exercise of due care, through the negligence of the defendant, he, the plaintiff, was injured; that plaintiff was driving in a westerly direction on Maple street at or near its intersection with Fifth avenue in the City of Wilmette, Illinois; that defendant was driving another automobile in a northerly direction on Fifth avenue, and that a collision occurred between the two automobiles at said intersection; that where these streets intersect the view is obscured by houses and trees lining the south side of Maple street and the east side of Fifth avenue; that plaintiff entered the intersection first and that defendant negligently drove his automobile at an excessive rate of speed, to-wit, 45 miles an hour, thereby violating the statutes of Illinois regulating the speed of automobiles on public highways and the right of way where such public

3081.A.480

MR. JEROME L. BROWN, JR., ATTORNEY AT LAW

CHICAGO, ILLINOIS

Defendant brings this appeal seeking to reverse a judgment for \$1,000.00, subject to a lien for \$880.01 in favor of the United States District and County of Cook, entered on the verdict of a jury in the Superior Court in favor of plaintiff William Williams for injuries alleged to have been sustained by him as well as property damage to the automobile he was driving when defendant's automobile collided with it on April 22, 1937, through the negligence, as alleged by plaintiff, of defendant in the operation of his automobile.

The complaint consists of four counts and alleges in substance that on April 22, 1937, while plaintiff was driving his automobile and in the exercise of due care, through the negligence of the defendant, he, the plaintiff, was injured; that plaintiff was driving in a westerly direction on Fifth Avenue at or near the intersection with Fifth Avenue in the City of Chicago, Illinois; that defendant was driving another automobile in a northerly direction on Fifth Avenue, and that a collision occurred between the two automobiles at said intersection; that where these streets intersect the view is obscured by houses and trees lining the south side of Maple Street and the east side of Fifth Avenue; that plaintiff entered the intersection first and that defendant negligently drove his automobile at an excessive rate of speed, to-wit, 45 miles an hour, thereby violating the statutes of Illinois regulating the speed of automobiles on public highways and the right of way when such public

streets intersect; that defendant operated his automobile in a wilful and wanton manner with disregard to the right and safety of plaintiff; that by reason of the foregoing, plaintiff received personal injuries of various kinds, including a ruptured ligament in his shoulder for which he had to undergo an operation; that plaintiff's automobile was damaged and broken and plaintiff suffered a loss of wages and incurred medical and hospital expense as well as property damage to the automobile.

Defendant's answer alleges that if any injury was sustained by plaintiff it was by reason of his own fault and carelessness; denies that plaintiff reached the intersection first; denies that defendant drove his car at an excessive rate of speed or at the speed alleged by plaintiff; denies that defendant was negligent; denies that defendant violated either of the statutes with respect to speeding and right of way; denies that the place where the accident occurred was a closely built up residential district; and further denies that defendant wilfully and wantonly operated his automobile, and alleges that defendant had insufficient knowledge to form a belief as to plaintiff's alleged damages, loss of wages or medical expenditures.

It appears from the evidence that the plaintiff Philmore was employed by Henry T. Matthews as a chauffeur and houseman and at the time of the accident said Philmore was engaged in carrying some household furnishings and draperies as directed by Matthews, and was performing services for which he was employed. Matthews was subject to the provisions as contained in the Workmen's Compensation Act of the State of Illinois, being Chapter 48 of the Illinois Revised Statutes, 1939. After injury, the plaintiff herein petitioned Matthews for compensation by virtue of said law and received as a result of said application the sum of \$630.01 through the United States Fidelity & Guaranty Company,

...defendant's negligence in a ...
...with ...
...of the ...
...in his ...
...for which he had no ...
...and ...
...as well as property ...
...to the ...

...
...by ...
...that ...
...at an ...
...that ...
...that ...
...and ...
...and ...
...that ...
...that ...
...loss of ...

...
...by ...
...of the ...
...both ...
...the ...
...of Illinois ...
...after ...
...by virtue of ...
...sum of ...

who was the insurer of Matthews, the employer, and is the sum which the court allowed as a lien or judgment in favor of the United States Fidelity & Guaranty Company against the \$1,000 judgment, as subrogee of Matthews, the insured, and for whom they paid the money to Philmore.

The defendant Otto H. Stein was a landscape gardener with an office on Jackson Boulevard in Chicago. He had a contract to do some landscaping at Indian Hill and at the time of the accident he was driving there to give instructions to the men who were employed in doing the work. He, also, was subject to the provisions of the Workmen's Compensation Act and was working thereunder at the time of the accident.

So, the evidence shows that at the time of the accident, both Matthews, the employer, and Philmore, the plaintiff, as well as Stein, the defendant, were subject to and working under conditions as would come within the provisions of the Workmen's Compensation Act of this State.

Chap. 48, Par. 168, Sec. 29, Ill. Rev. Stats. 1930, reads as follows:

"where an injury or death for which compensation is payable by the employer under this Act was not proximately caused by the negligence of the employer or his employees, and was caused under circumstances creating a legal liability for damages in some person other than the employer to pay damages, such other person having also elected to be bound by this Act, or being bound thereby under section three (3) of this Act, then the right of the employee or personal representative to recover against such other person shall be transferred to his employer and such employer may bring legal proceedings against such other person to recover the damages sustained, in an amount not exceeding the aggregate amount of compensation payable under this Act, by reason of the injury or death of such employee."

Although plaintiff has obtained from his employer compensation for the damages to his person to the extent of \$920.01, no attempt was made, ~~except by the employer~~, either by the employer or the employee, to transfer this case to Matthews, the employer of plaintiff. Had it not been for the claim made for damages to the automobile,

who was the inventor of the device, the employee, and in the same which
the court allowed as a lien on judgment in favor of the United
States. Plaintiff's liability is hereby assigned to the United States, and
the court of equity, the plaintiff, and the court may have the
money to plaintiff.

The defendant, John H. Smith, was a resident of Chicago, and
an office on Jackson Boulevard in Chicago. He had a contract to do
work for the plaintiff at Madison Hill and at the time of the accident
he was giving him the instructions in the way of work
employed in doing the work. He, also, was subject to the provisions
of the Workmen's Compensation Act and was working thereunder at
the time of the accident.

So, the evidence shows that at the time of the accident,
John H. Smith, the plaintiff, was employed, as well
as John, the defendant, were subject to and working under conditions
as would come within the provisions of the Workmen's Compensation
Act of this State.

On July 25, 1913, at Chicago, Ill., the following was
as follows:

"There is injury to the plaintiff, John H. Smith, as
shown by the evidence. This was not preventable
caused by the negligence of the employer or his employees, and
was caused under circumstances creating a legal liability for
damages in some person other than the employer or his employees,
such other person having also elected to be bound by this act,
or being bound thereby under section three (3) of this act,
then the right of the employee or person representative to
recover against such other person shall be transferred to his
employer and such employer may bring legal proceedings against
such other person to recover the damages sustained, in an amount
not exceeding the amount of compensation payable
under this act, by reason of the injury to death of such employee."

Although plaintiff has obtained from his employer compensa-
tion for the damage to his person to the extent of \$250.00, he
attempts to recover, through the employer or the
employer, the amount of the injury to his person, the damages for the same.

we doubt very much whether the plaintiff could have proceeded with his suit because of the provisions as contained in the statute heretofore cited. However, from a perusal of the judgment order we find that the questions as to who negligently caused the damages, and the right of the intervening petitioner, the insurance company, to appear in court as subrogee of Matthews, and other controverted questions, have been disposed of by an agreement between the parties. The stipulation or agreement as contained in the judgment order reads in part as follows:

"And the court finding that the United States Fidelity and Guaranty Company, a corporation, has filed its intervening petition in the above entitled cause pursuant to the provisions of Section 29 of the Workmen's Compensation Act of the State of Illinois (Illinois Revised Statutes 1957, Chapter 48, Par. 166) wherein it is alleged that said intervening petitioner has heretofore paid to or on behalf of plaintiff herein pursuant to the terms and provisions of the said Workmen's Compensation Act the sum of \$830.01; and the court finding that the allegations of said petition have been admitted to be true by all the parties hereto in open court, * * *

In considering the intervening petition, to which said judgment order refers, we find that the allegations are substantially as follows; that at the time of the accident plaintiff was in the employ of one Henry T. Matthews; that the accident arose out of and in the course of his employment with Matthews; that Matthews was bound by and subject to the Workmen's Compensation Act, and that the plaintiff made claim and was paid compensation by Matthews, by his insurance carrier, The United States Fidelity and Guaranty Company, pursuant to said Act in the total amount of \$830.01, and that by reason thereof, and by the terms of the policy of insurance, it was the bona fide subrogee of Matthews, and further alleged that on said date the said William Philmore was operating an automobile in a westerly direction on Maple street at or near the intersection of said street with Fifth avenue, both being public thoroughfares in the Village of Wilmette, County of Cook and State of Illinois, and that said William Philmore was in the exercise of all due care

and caution and that at the time and place the defendant Otto A. Stein was operating an automobile in a northerly direction upon Fifth Avenue approaching the intersection with Maple street and that as a result of the carelessness, negligence and improper conduct of the said defendant, an accident occurred at said intersection whereby the said William Philmore sustained severe injuries; that the accident and injury arose out of and in the course of plaintiff's employment with the said Henry T. Matthews and that the said Henry T. Matthews was in the exercise of due care and caution for his own safety and for the safety of his employees. The petition further alleged that in the event William Philmore made recovery in this cause, the United States Fidelity and Guaranty Company is entitled to be reimbursed. If there had not been an allegation and proof as to the property damage to plaintiff's automobile, we would be inclined to limit the judgment to \$620.01, being the amount of damages assessed and paid under the terms of the Workmen's Compensation Act. However, there being a claim for property damage, the jury, well within their province as supported by the evidence, could have allowed the difference between the \$1,000 and \$620.01, as being the amount which, in their opinion, plaintiff was entitled to recover aside from the amount allowed for personal injuries.

Having considered the agreement made in open court as contained in the judgment order entered, we do not find there is anything left for this court to review. As that order in effect stated, all the parties in open court agreed to the negligence of the defendant Stein and that proper care was exercised by the plaintiff Philmore and Matthews, his employer, and the right of the plaintiff to recover; that all parties also agreed that the United States Fidelity and Guaranty Company should have a lien on the judgment, we think the trial court disposed of the matter in the best possible manner, namely,

entering a judgment for \$1,000, subject to the lien of the subrogee United States Fidelity and Guaranty Company. As a consequence nothing remains for this court to do but to affirm the judgment, which is accordingly done.

For the reasons herein given the judgment of the Superior Court is affirmed.

JUDGMENT AFFIRMED.

HEBEL AND BURKE, JJ. CONCUR.

1. The first of these is the fact that the Government has not yet decided whether or not to proceed with the proposed legislation. This is a matter of great importance, as it will determine whether or not the Government is committed to the proposed changes.

2. The second of these is the fact that the Government has not yet decided whether or not to proceed with the proposed legislation. This is a matter of great importance, as it will determine whether or not the Government is committed to the proposed changes.

3. The third of these is the fact that the Government has not yet decided whether or not to proceed with the proposed legislation. This is a matter of great importance, as it will determine whether or not the Government is committed to the proposed changes.

4. The fourth of these is the fact that the Government has not yet decided whether or not to proceed with the proposed legislation. This is a matter of great importance, as it will determine whether or not the Government is committed to the proposed changes.

5. The fifth of these is the fact that the Government has not yet decided whether or not to proceed with the proposed legislation. This is a matter of great importance, as it will determine whether or not the Government is committed to the proposed changes.

6. The sixth of these is the fact that the Government has not yet decided whether or not to proceed with the proposed legislation. This is a matter of great importance, as it will determine whether or not the Government is committed to the proposed changes.

7. The seventh of these is the fact that the Government has not yet decided whether or not to proceed with the proposed legislation. This is a matter of great importance, as it will determine whether or not the Government is committed to the proposed changes.

8. The eighth of these is the fact that the Government has not yet decided whether or not to proceed with the proposed legislation. This is a matter of great importance, as it will determine whether or not the Government is committed to the proposed changes.

9. The ninth of these is the fact that the Government has not yet decided whether or not to proceed with the proposed legislation. This is a matter of great importance, as it will determine whether or not the Government is committed to the proposed changes.

10. The tenth of these is the fact that the Government has not yet decided whether or not to proceed with the proposed legislation. This is a matter of great importance, as it will determine whether or not the Government is committed to the proposed changes.

40715

GEORGE J. EPOSTEIN,

Appellee.

v.

EDWARD A. MORRIS,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

302 I.A. 502

MR. PRESIDING JUSTICE OWEN F. SULLIVAN DELIVERED THE OPINION OF THE COURT.

On October 17, 1938, plaintiff George J. Epstein filed his statement of claim and cognovit on a note asking for a judgment on the note by virtue of a power of attorney attached thereto. Judgment by confession for the sum of \$1,887.50 and costs was entered on October 17, 1938.

On November 2, 1938, defendant Edward A. Morris filed a motion for leave to appear and defend against the judgment entered by confession with affidavit in support thereof. Defendant's motion to appear and defend was granted and the defendant was given leave to appear and defend, the judgment to stand as security and his petition to stand as an affidavit of merits. On November 26, 1938, the defendant on leave granted by the court, filed a counterclaim against the plaintiff and plaintiff filed an answer to the counterclaim.

On January 14, 1939, a trial was had before the court without a jury, at which time the court made a finding that at the date of the rendition of the judgment by confession, defendant owed plaintiff the sum of \$1,887.50, confirmed the judgment by confession of October 17, 1938, including costs, against the defendant, and entered judgment on a finding against the defendant and in favor of the plaintiff on the defendant's counterclaim.

Plaintiff's theory of the case is that the evidence shows

the defendant, Edward A. Morris, in satisfaction of an existing obligation, signed a promissory note with plaintiff George J. Epstein as payee, on June 27, 1938, in the sum of \$3,000 as a renewal note for a previous promissory note in the same amount maturing about the same day; that on September 28, 1938, defendant Edward Morris, tore off his signature to the aforesaid \$3,000 note, even though said note was unpaid, the defendant at that time intending to destroy the evidence of his obligation; that said note so torn is plaintiff's exhibit 18; that on October 13, 1938, the defendant paid \$300 as principal and \$17 as interest in advance on account of the \$3,000 obligation, and that therefore defendant owed the plaintiff the sum of \$1,700 as principal, and certain other moneys as interest; further that the finding of the trial court is not contrary to the manifest weight of the evidence.

Defendant's theory of the case is that the clear and manifest weight of the evidence shows that defendant prior to May 17, 1938, owed plaintiff \$3,000, evidenced by a promissory note executed March 28, 1938 which fell due on June 27, 1938. That on May 17, 1938, defendant paid to the plaintiff \$1,000 in cash in reduction of the previously existing \$3,000 obligation; that on June 27, 1938, defendant paid the remaining balance of \$1,000, and took up the then existing note; that the defendant never executed any note on June 27, 1938, for \$3,000; that defendant never tore any signature off any such note on September 28, 1938; that the plaintiff's claim against the defendant was fully satisfied on June 27, 1938, by payment in full; that on October 13, 1938 defendant at plaintiff's request loaned plaintiff the sum of \$300 in cash; that plaintiff has never repaid this loan; that the competent, credible evidence in the record clearly and convincingly discloses that the plaintiff's claim

[illegible]

upon a note alleged to have been executed by the defendant on June 27, 1938, was the result of a family dispute and "family hatred" between defendant Edward A. Morris, on the one hand, and his brother Benjamin Morris and plaintiff Epstein on the other hand; that the plaintiff George J. Epstein, a nephew of Benjamin Morris and of the defendant, was only a figurehead in the law suit acting on behalf of, and for the benefit of Benjamin Morris.

A further theory is that at the trial of the cause, procedural error in the admission of incompetent and improper testimony on behalf of the plaintiff over the objections of the defendant, was error that prejudiced the defendant's rights and defense, and was reversible error for which this court should set aside the finding and judgment of the trial court and grant a new trial.

Both parties to this litigation agree that this is a "family law suit"; that the principals and many of the witnesses herein are related through kinship by blood or marriage. The record contains over 400 pages of contradictory evidence, which cannot in many of its controlling features be reconciled. Without setting forth the vast amount of contradictory evidence and without commenting thereon in detail, it is sufficient to say that we have read the evidence and we cannot find wherein the trial court did other than enter a judgment upon the finding which was in harmony with the preponderance of the evidence.

In the case of Marlag v. Farjan, 283 Ill. App. 157, the court at page 158, said:

"It will thus be seen that the evidence was sharply conflicting on the vital question in the case. Two witnesses called by the defendant testified that two of the checks mentioned were delivered by the makers of them to the defendant. Two of the checks are payable to plaintiff; none of them is payable to the defendant. The three checks were all indorsed by plaintiff and the defendant's name is not on them.

Upon a careful consideration of all the evidence in the record we are unable to say on which side the truth lies.

When a note is made to have been received by the defendant on the

last of 1908, was the result of a family dispute and a family

dispute between defendant and the plaintiff, and the same was

his brother Benjamin and plaintiff's brother on the other hand;

that the plaintiff George J. Brown, a nephew of Benjamin's

and of the defendant, was only a witness in the last party

on behalf of, and for the benefit of Benjamin's estate.

A further reason is that at the time of the party,

plaintiff's brother on the occasion of defendant's and plaintiff's

was on behalf of the plaintiff and the defendant of the defendant,

and that the defendant's brother's estate and defendant, and

was reversible error for which this court should not make the

finding and judgment of the trial court and grant a new trial.

It is further to be noted that this is a family

dispute; that the plaintiff and many of the witnesses therein

are related through blood to the defendant, the plaintiff

and the defendant's brother, and the defendant's brother

was of the defendant's brother in defendant's brother's

with the defendant's brother and witness

examined the same in detail, it is concluded that the trial court

and the witness and the witness that the trial court did

find that a judgment was the finding was in favor

with the defendant of the defendant.

In the case of State v. Brown, 100, 101, 102, 103, 104,

and of page 105, 106.

"It will thus be seen that the witness was

examined on the trial of the case, the witness

being the witness examined on the trial of the case.

But the witnesses were heard and observed by the trial judge. He found in favor of the defendant and unless we are able to say upon a reading of the printed page that the finding is against the manifest weight of the evidence, we are not warranted, under the law, in disturbing the finding of the trial court. We are unable to say that the finding of the trial judge is against the manifest weight of the evidence, and therefore the judgment cannot be disturbed." Stephens-Idamson Mfg. Co. v. Fireman's Fund Ins. Co., 287 Ill. App. 443; Mannan v. Morris, 328 Ill. 322.

Criticism is made to the ruling of the trial court upon certain evidence, but the rule being that where a case is tried before a court without a jury, we must assume that the trial court did not consider any incompetent evidence which may have been submitted, but based its finding and judgment solely upon competent evidence.

In the case of Maton Bros. v. Central Ill. Serv. Co., 358 Ill. 584, the court at page 595, said:

"The defendant claims that the trial court admitted incompetent evidence. The objection is made that the court erred in receiving the testimony * * *. The cause being tried before the court, the presumption is that the court did not consider any incompetent evidence that may have been received. There is sufficient competent evidence in the record fairly tending to sustain the judgment recovered."

So, in this case, we are of the opinion that the trial judge was justified in making the finding and in entering the judgment which he did, and for the reasons herein given the judgment of the Municipal Court is affirmed.

JUDGMENT AFFIRMED.

HENEL AND BURKE, JJ. CONCUR.

40734

C. LIOLIOS, defendant for use of Dr. A.
L. STEARNS, Plaintiff,

Appellee,

APPEAL FROM

v.

LONDON GUARANTEE & ACCIDENT CO., LTD.,
and SENSIBAR ENGINEERING & PAVING CO.,
corporations, defendants,

Appellees,

MUNICIPAL COURT

OF CHICAGO.

On Appeal of A. GEORGE E. SPANSON,
Intervening Petitioner,

Appellant.

302 I.A. 506

MR. PRESIDING JUSTICE DENIS E. SULLIVAN DELIVERED THE
OPINION OF THE COURT.

This case has been consolidated with case No. 40733,
entitled, Christ Liolios defendant, for the use of The University
Hospital, a corporation, Plaintiff, Appellee, v. London Guarantee &
Accident Co., Ltd., and Sensibar Engineering & Paving Co., corpora-
tions, Garnishee Defendants, Appellees, - On Appeal of A. George E.
Spanson, Intervening Petitioner, Appellant, in which this court
has today filed an opinion.

The facts are the same in both cases except that in this
case the appeal is taken from a judgment which was entered in the
Municipal Court in favor of defendant for the use of Dr. A. L. Stearns,
plaintiff, against the garnishees for \$352.50, whereas, in case No.
40733 a judgment was entered in favor of defendant for the use of
The University Hospital, plaintiff, against the garnishees for \$596.00.

Inasmuch as the facts in both cases are the same and the law
controlling in case No. 40733 is controlling in this case, the views
expressed in that opinion are applicable in this case, and in both
cases the intervening petitioner Spanson is allowed a total sum of
\$565.

JUDGMENT ORDER AFFIRMED AND JUDGMENT HERE IN
CONJUNCTION WITH CASE NO. 40733 IN FAVOR OF
INTERVENING PETITIONER SPANSON FOR \$565.00.

HEBEL AND BURKE, JJ. CONCUR.



3021.A.508

THE UNIVERSITY OF CALIFORNIA, SCHOOL OF MEDICINE

OFFICE OF THE DEAN

This case has been assigned to the Dean of the University

of California, School of Medicine, for his consideration.

The University of California, School of Medicine, is a

public institution of higher learning, and it is the

policy of the University to provide for the education

of all students who are admitted to the University.

The University of California, School of Medicine, is a

public institution of higher learning, and it is the

policy of the University to provide for the education

of all students who are admitted to the University.

The University of California, School of Medicine, is a

public institution of higher learning, and it is the

policy of the University to provide for the education

of all students who are admitted to the University.

The University of California, School of Medicine, is a

public institution of higher learning, and it is the

policy of the University to provide for the education

of all students who are admitted to the University.

MADE IN U.S.A. 11-10-50

40743

FRANK DeCICCO, Administrator of the
Estate of Raymond DeCicco, Deceased,

APPEAL FROM

Appellant,

CIRCUIT COURT

v.

JOSEPH VEDRAZKA,

Appellee.

COCK COUNTY.

302 I.A. 507

MR. PRESIDING JUSTICE DENIS E. SULLIVAN DELIVERED THE
OPINION OF THE COURT.

Plaintiff brings this appeal from a judgment entered
against him on a finding in the Circuit Court, without a jury,
wherein the defendant was found not guilty. This is the second
appeal in this case.

At a former hearing before the trial court defendant
Joseph Vedrazka was found guilty and a judgment for \$4,000 was
entered in his favor and against the plaintiff. On defendant's
appeal to this court in that case, being cause No. 30138, entitled
Frank DeCicco, Administrator of the Estate of Raymond DeCicco,
Deceased, Appellee, v. Joseph Vedrazka, Appellant, this court
reversed the judgment and the cause was remanded for a new trial.
On the second trial in the Circuit Court, defendant was found not
guilty and it is from such decision and judgment for costs that
plaintiff now brings this appeal.

This action is brought for damages claimed under the
Injuries Act, for the wrongful death of plaintiff's intestate,
Raymond DeCicco, a miner. When the case was first tried the only
charge made in the complaint was a sale of cartridges by the
defendant to minors in violation of a city ordinance. After the
cause was remanded and re-docketed, plaintiff filed a second amended
complaint consisting of three counts, alleging a violation of a
city ordinance, in the first count; general negligence in the second
count; and wilfulness in the third count. Defendant filed an answer
to the said second amended complaint denying all allegations.

ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED
DATE 08-11-2010 BY 60322 UCBAW

...the ...

[illegible]

THE UNIVERSITY OF CHICAGO LIBRARY

11000 414 30 00115

...in the second ...

IT IS FURTHER NOTED THAT THE ABOVE-REPRODUCED
PAGE 10 OF THE REPORT OF THE COMMITTEE ON
THE ASSASSINATION OF MARTIN LUTHER KING, JR.
IS A COPY OF THE REPORT OF THE COMMITTEE ON
THE ASSASSINATION OF MARTIN LUTHER KING, JR.
AS SUBMITTED TO THE SENATE AND HOUSE OF REPRESENTATIVES
ON APRIL 1, 1968.

[illegible]

the following is a list of the names of the persons who were present at the meeting held on the 1st of May, 1910, at the residence of the late Mr. J. H. Smith, at the corner of 1st and 2nd streets, New York City.

A new trial was had and, by stipulation of the parties, it was agreed that the testimony offered at the former trial be considered as the testimony in the second trial. No new or additional evidence was offered.

In the opinion of this court on the former appeal, in speaking of the proximate cause of the injury, the case of Martinet v. The Boston Store, 205 Ill. 331, is cited, and a portion of the Supreme Court's opinion is quoted, as follows:

"There are three essential elements in actionable negligence; first, a duty imposed by law to exercise care in favor of the person for whose benefit the duty is imposed; second, the failure to perform that duty, and third, a consequent injury so connected with the failure to perform the duty that the failure is the proximate cause of the injury. What constitutes proximate cause has been defined in numerous decisions, and there is practically no difference of opinion as to what the rule is. The injury must be the natural and probable result of the negligent act or omission and be of such a character as an ordinarily prudent person ought to have foreseen might probably occur as a result of the negligence, although it is not essential that the person charged with negligence should have foreseen the precise injury which might result from his act. If the negligence does nothing more than furnish a condition by which the injury is made possible, and that condition causes an injury by the subsequent independent act of a third person, the creation of the condition is not the proximate cause of the injury. (Cooley on Torts, - 3d. ed. - 99; Chicago Hair & Bristol Co. v. Mueller, 208 Ill. 558; Smith v. Commonwealth Electric Co., 241 Id. 252.)"

Continuing in the opinion written by the late Mr. Justice Hall, formerly of this court, it is stated:

"In view of the holding of the Supreme Court in the case just cited, and of the fact that the record fails to show by a preponderance of the evidence that the defendant was responsible for the death of plaintiff's intestate, we are constrained to hold that the court was in error in finding for the plaintiff. The judgment is, therefore, reversed and the cause remanded."

At the conclusion of the second hearing the trial court found from the evidence that the defendant was not guilty. This general finding included all the allegations of negligence as contained in the complaint, and we can find nothing from a review of the evidence tending to show that the court was not justified in making such finding.

In Casper v. Illinois Central Railway Co., 102 Ill. App.

104, 105, the court said:

"The evidence adduced upon the last trial was the same in every substantial particular as that adduced upon the former trial, and the conclusion arrived at by this court upon the former appeal * * * was binding upon the trial court on the subsequent trial of the case * * * and such conclusion is binding upon this court on the present appeal."

The finding of fact in the former case, where no additional evidence is introduced, is binding on this court, and although we have again reviewed the record, we fail to find anything which would justify our deviating from the opinion heretofore filed by this court.

For the reasons herein given the judgment of the Circuit Court is affirmed.

JUDGMENT AFFIRMED.

HEBEL AND BURKE, JJ. CONCUR.

IN REPLY TO THE MEMORANDUM OF THE ATTORNEY GENERAL

DEAR MR. ATTORNEY:

The evidence adduced upon the facts of the case is every substantial question as to whether or not the defendant is guilty of the crime charged. It is the duty of the jury to weigh the evidence and to render a verdict according to the law. It is not the duty of the court to remove the case from the jury's consideration.

The finding of fact in the case above, where an additional witness is introduced, is founded on this point, and although we have again reviewed the record, we fail to find anything which would justify our deviating from the opinion previously filed by this court.

THE ATTORNEY GENERAL

DEAR MR. ATTORNEY:

RECEIVED

DEAR MR. ATTORNEY:

40780

SAMUEL B. EPSTEIN,

Appellee,

v.

CHARLES F. HENRY, HOWARD D. HENRY
and MINNIE M. CASE,

Appellants.

SPECIAL ROOM

MUNICIPAL COURT

OF CHICAGO.

MR. PRESIDING JUDGE DENIS E. SULLIVAN DELIVERED THE OPINION
OF THE COURT.

302 I.A. 507²

Suit was commenced by plaintiff Samuel B. Epstein, for attorney's fees in the sum of \$800.00 for services claimed to have been rendered in a proceeding in the Federal Court for the Highlands Hotel Building Corporation. The defendant corporation pleaded its dissolution prior to the services rendered, the two years' statute of limitations and that the services claimed were of no value and of no benefit to it. The individual defendants herein, Charles F. Henry, Howard D. Henry and Minnie Case, were then made parties to the suit. They answered that they had not hired the plaintiff and that the services were worth nothing.

At the close of the evidence the trial court dismissed Highlands Hotel Building Corporation as defendant and submitted the issues to the jury as to the individual defendants. The jury returned a verdict for \$800.00 against the individual defendants, upon which the court entered judgment after denying motion of defendants for judgment non obstante verdicto. The individual defendants filed a motion for a new trial which was denied, and they now bring this appeal.

Plaintiff's theory is that he was retained by defendants, purporting to act for Highlands Hotel Building Corporation, to perform certain legal services; that on June 11, 1935, the date of plaintiff's retainer, the corporation had been dissolved for more than two years,

2

a fact unknown to plaintiff; that from June 11, 1933 to June 25, 1934, plaintiff performed services as agreed and on June 25, 1934, plaintiff was discharged and he sent a statement claiming \$500.00. Not receiving payment, suit was instituted against the corporation. Upon learning all the facts, the complaint was amended to add the defendants as parties. The defendants knew, or should have known, of the dissolution of the corporation, were its active managers and agents, contracted in its name after it was legally dead, and are therefore personally liable for plaintiff's claim.

The defendants' theory of the case is that they did not hire the plaintiff; that plaintiff rendered them no bills and that he was hired to represent the corporation alone and was to obtain his fees by allowance of the Federal Court in the 77-B proceeding; that plaintiff could not recover his fees against the corporation in a State court because of the two years' statute of limitations; that the Federal Bankruptcy Act as interpreted by the Federal Courts authorized the dissolved corporation to hire plaintiff and have him appear for it in the Federal Court and obtain his fees from the estate; that that was the sole contract; that they nor any of them ever hired plaintiff individually to represent them or the corporation and are not liable; that the services of plaintiff were of no value and of no benefit to the corporation and the verdict of the jury is excessive and against the weight of the evidence; that the court erroneously instructed the jury and excluded evidence offered by defendants; that plaintiff's counsel in argument to the jury under sanction of the court below misquoted the evidence; that the court below prevented defendants' counsel from arguing admitted evidence.

The dates as to the commencement of suit, the issuing of summons and some of the other dates as to the pleadings are contradictory.

moments and some of the other dates as to the positions and positions.

The dates as to the movements of this, the landing at

original divided witness.

witness, that the same witness had been previously examined and

in the jury which resulted in the same being returned the

evidence offered by defendant; that plaintiff's counsel in argument

submitted, that the same witness had been previously examined and

resulted in the jury in returning and against the witness in the

still were of no value and of no weight in the comparison and the

on the comparison and are not liable; that the evidence of witness

any - at that time witness had been previously examined and

from the witness; that that was the sole evidence; that they not

have any reason for it in the witness's hands and against his face

which defendant had presented testimony to give plaintiff and

that the witness testimony had been interpreted by the witness

in a state court because of the two years' absence of limitation;

that plaintiff could not recover his time against the corporation

law in absence of the federal court in the two witnesses;

was hired to represent the corporation alone and was to obtain his

the plaintiff; that plaintiff testified that he knew and in a

The defendant, theory of the case is that they did not like

and therefore personally liable for plaintiff's claim.

and witness, connected in the same story as was legally done, and

of the dissolution of the corporation, were the active managers

attestations as parties. The defendant's story, as should have been

then learned all the facts, the testimony was returned as all the

his testimony returned, with the testimony against the corporation.

plaintiff was discharged and he gave a statement claiming \$100,000.

plaintiff performed services as agent and on June 22, 1902,

a test witness to plaintiff, that from June 11, 1902 to June 22, 1902,

From plaintiff's testimony it appears that all his dealings were with Highlands Hotel Building Corporation and were not with the individual defendants herein. His testimony indicates his having had a conversation with Charles F. Henry, the president of Highlands Hotel Building Corporation, concerning a suit which was pending against the said corporation in the Federal Court; that after their discussion the plaintiff told Henry that it would be necessary to have the corporation adopt a resolution authorizing him, Henry, to file an appearance to the matters in the Federal Court; that plaintiff wanted specific authority so that he would know that he was authorized to file an appearance; that he filed an appearance in the Federal Court on behalf of the Highlands Hotel Corporation, and not the individual defendants, and made a docket in the office of the proceedings; that the books of the corporation were sent to plaintiff's office and the minutes of the meeting and the resolution were drawn by plaintiff, authorizing the said corporation to retain plaintiff as counsel for said Highlands Hotel Building Corporation and no one else. Said meeting of the directors of said corporation was held on June 11, 1935, and there were present Minnie H. Case, Louise Henry and Howard D. Henry, they being the directors, and upon a motion duly made, seconded and carried, the following resolution was adopted in the form as prepared by plaintiff and passed at his suggestion:

"RESOLVED, that the President be, and he is hereby authorized to enter into a contract, retaining Samuel B. Epstein, 1 North La Salle Street, Chicago, Illinois, as the attorney for this corporation, to represent this corporation in all negotiations and conferences and in all proceedings in any court and in all litigation and controversies to which this corporation is now or may hereafter become a party."

The testimony further shows that a Mr. Gosset, who was Chairman of the Bondholders Committee and who had a majority of the bonds which were issued against the corporation, was the one with whom plaintiff claimed he had his dealings so far as doing any service for the Highlands Hotel Corporation was concerned.

From Plaintiff's testimony it appears that all his dealings were with Highland Hotel Building Corporation and were not with the individual defendants herein. His testimony indicates that having had a conversation with Charles J. Henry, the president of Highland Hotel Building Corporation, concerning a suit which was pending against the said corporation in the Federal Court; that after their discussion the Plaintiff told Henry that it would be necessary to have the corporation adopt a resolution authorizing him, Henry, to file an appearance to the action in the Federal Court; that Plaintiff wanted specific authority so that he would know that he was authorized to file an appearance; that he filed an appearance in the Federal Court on behalf of the Highland Hotel Corporation, and not the individual defendants, and when a check in the office of the proceedings; that the books of the corporation were sent to Plaintiff's office and the minutes of the meeting and the resolution were drawn by Plaintiff, authorizing the said corporation to retain Plaintiff as counsel for said Plaintiff Hotel Building Corporation and no one else. With meeting of the directors of said corporation was held on June 11, 1934, and there were present Charles J. Henry, Louis Henry and Edward W. Henry, they being the directors, and also a motion duly made, seconded and carried, the following resolution was adopted in the form as prepared by Plaintiff and passed at his suggestion:

"WHEREAS, that the President of, and he is hereby authorized to enter into a contract, retaining counsel E. W. Henry, I hereby do hereby certify, Charles J. Henry, as the attorney for said corporation, as authorized and authorized in all proceedings and in all proceedings in any court and in all litigation and controversy in which this corporation is now or may hereafter become a party."

The testimony further shows that a Mr. Henry, who was Chairman of the Landmark Committee and who had a majority of the shares which were issued, signed the corporation, was the one with whom Plaintiff claimed he had his dealings as far as being authorized for the Highland Hotel Building Corporation was concerned.

A verified affidavit of plaintiff Epstein was filed in court on November 14, 1936, in which affidavit he swears that all work was done for the corporation.

On December 18, 1936, the plaintiff on motion added other defendants by adding to his statement of claim the following paragraph:

"That the defendants, CHARLES HENRY, HOWARD D. HENRY and MIRIAM M. CASE retained the plaintiff to represent them, to advise them and to perform such services as may be desirable for the protection of their interests in the said HIGHLANDS HOTEL BUILDING CORPORATION, and that the said defendants agreed to pay to the plaintiff the reasonable and fair value of the services so rendered by him; that accordingly the plaintiff performed numerous valuable services on behalf of all of the defendants herein, which services consisted of conferring with all of the defendants at various times, with the Bondholders Protective Committee for the protection of the first mortgage bonds secured by the trust deed * * *"

This was a general hiring by the corporation and not one limited to any particular suit. So far as we have been able to discover there is no evidence of any retaining on behalf of the individuals, but solely on behalf of the corporation. The corporation was dissolved in 1933 for failure to pay its franchise tax under the State law. There is no evidence that the Henrys or Mrs. Case knew of this fact and it is now claimed that because of this fact the defendants individually should be held liable. At the time of the drawing of the resolution by plaintiff for the purpose of retaining him as attorney for the defendant corporation, we should think that one of the first things he should have done was to have made inquiry as to whether or not the corporation was existent in order that he, the plaintiff, might make a valid contract with the corporation. It would seem to us that this would be a very important inquiry for him to make when he was being hired, to ascertain if his client was a legal entity. There is no evidence that this information was

A verified affidavit of plaintiff was filed in court
on November 14, 1933, in which affidavit he swore that all work
was done for the corporation.
On November 14, 1933, the plaintiff on motion asked other
defendants by asking to his statement of facts the following
interrogatories:

"That the defendant, JAMES H. HUNT, during the time he
was in the service of the plaintiff is entitled to receive
wages then and to certain work services he may be entitled
for the protection of their interests in the plaintiff
plaintiff corporation, and that the said defendant
acted as for in the plaintiff the reasonable and fair value
of the services rendered by him, that accordingly the
plaintiff corporation should receive the value of
all of the defendant's services, which services consisted of
conducting with all of the defendant as a partner, since, after
the defendant's protective committee has the possession of
the first mortgage loans secured by the first bank."

This was a general ruling by the corporation and not one
limited to any particular suit. As far as we have been able to
discover there is no evidence of any retaining on behalf of the
plaintiff, but solely on behalf of the corporation. The corporation
was dissolved in 1931 the reason as per the documents was that the
State law. There is no evidence that the company of H. H. Hunt was
of any kind and it is not claimed that because of this that the
defendant individually should be held liable. At the time of the
dissolution of the corporation by the plaintiff for the purpose of retaining
him as attorney for the defendant corporation, we should think that
one of the things he should have done was to have made inquiry
as to whether or not the corporation was retained in order that he
the plaintiff, might make a valid contract with the corporation. If
well known is to find this will be a very important inquiry for
him to make when he was being hired, to ascertain if the client
was a legal entity. There is no evidence that this information was

possessed by the defendants or that the plaintiff was prevented by defendants from finding out the facts.

As to the merits of the controversy, there is no evidence as to the work that was done. Plaintiff stated that he had kept no record as to the amount of time expended in doing the work and the uncontradicted evidence of the defendants is that he did not spend over four or five hours in doing work for the corporation and that none of this work was done for the individual defendants herein. When this suit was instituted it was brought solely against the corporation and not the individual defendants, the latter were brought in later on a supplemental motion.

It is quite evident there was a misunderstanding as to the issue which was being submitted to the jury. Although the plaintiff testified that he had kept no record and could not say how much time he had put in, the court instructed the jury that, "the jury have a right to and should take into consideration all the facts and circumstances proved by a preponderance of the evidence pertaining to such damages; the standing of the plaintiff as an attorney at law; the amount of time consumed by his services and the results achieved; his earning power, and any other facts or circumstances proved by a preponderance of the evidence pertaining to the reasonable value of his services, " * * " Such instruction should not have been given as there is no evidence to sustain it. As before stated, no testimony was submitted as to the amount of time consumed by plaintiff in performing the services which he claims he rendered, nor was there any testimony that any beneficial results were obtained for defendants. If there is no evidence as to the amount of time plaintiff consumed in doing the work, then there was no point in referring to the earning power of the plaintiff.

The only questions to be determined here are: Did defendants

presented by the defendant on the 1st of January was presented

by reference from the 1st of January.

As to the merits of the controversy, there is no evidence

as to the facts that are shown. It is not shown that he had been

shown as to the amount of time expended in doing the work and the

estimated expenses of the defendant as to the work and the

cost of the work as shown by the defendant and the

cost of the work as shown by the defendant and the

cost of the work as shown by the defendant and the

cost of the work as shown by the defendant and the

cost of the work as shown by the defendant and the

cost of the work as shown by the defendant and the

cost of the work as shown by the defendant and the

cost of the work as shown by the defendant and the

cost of the work as shown by the defendant and the

cost of the work as shown by the defendant and the

cost of the work as shown by the defendant and the

cost of the work as shown by the defendant and the

cost of the work as shown by the defendant and the

cost of the work as shown by the defendant and the

cost of the work as shown by the defendant and the

cost of the work as shown by the defendant and the

cost of the work as shown by the defendant and the

cost of the work as shown by the defendant and the

cost of the work as shown by the defendant and the

cost of the work as shown by the defendant and the

cost of the work as shown by the defendant and the

cost of the work as shown by the defendant and the

cost of the work as shown by the defendant and the

cost of the work as shown by the defendant and the

hire the plaintiff and, if so, what is a fair and reasonable value of such services? Neither of these vital elements were proven.

The evidence discloses that the corporation's franchise was forfeited several years before suit was instituted as an abstract of title was received by plaintiff showing this to be a fact. In addition to this on June 5, 1936, a letter was sent to plaintiff by one Mr. Mirdlinger, advising plaintiff that a decree had been rendered on June 1, 1935, dissolving the Highlands Hotel Building Corporation. The evidence also shows that as late as November 18, 1937, suit was instituted against the corporation and not the individuals, thus showing that after having been fully advised in the matter, plaintiff still considered the corporation the debtor and not the individuals.

On June 25, 1938, a letter from the Highlands Building Corporation, by Charles F. Henry, was written to Samuel Epstein, in which letter it is stated that Epstein was only hired to represent the corporation in the Federal Court, and that if they wished him to represent them in any other way they would so advise him.

In the instant case we think the evidence sustains the defendants' contentions and for the reasons herein given the judgment of the Municipal Court is reversed.

JUDGMENT REVERSED.

HEBEL AND BURKE, JJ. CONCUR.

first the defendant and, at the same time, in a last and reasonable sense
 at such various points of view which were given.
 The witness himself said that the defendant's conduct was
 peculiarly reprehensible, that he was interested in an object at
 first was treated by defendant as a person who was a traitor, and
 defendant as a traitor, and a traitor - as was the defendant in
 some of the defendant's conduct, defendant himself said a person who was
 engaged on June 1, 1933, directly the defendant's conduct
 defendant. The witness also shows that as late as November 19,
 1933, and was interested against the defendant and not the
 defendant. The witness also shows that the defendant was still engaged in
 the matter, defendant still maintained the defendant's conduct
 and not the defendant.
 On June 19, 1933, the witness from the defendant's conduct
 defendant, by defendant's conduct, was engaged in the defendant's
 in which defendant is engaged in the defendant's conduct and was given in testimony
 the defendant in the Federal Court, and that if they asked him
 in testimony from in any other way they would be given him.
 In the instant case as given the witness testimony the
 defendant's conduct and the defendant's conduct given the defendant
 of the defendant's conduct is repeated.

WITNESS TESTIMONY.

WITNESS TESTIMONY, 19, 1933.

40853

CHARLES A. COEY and CARRIE H. COEY,

) APPELLANTS.

Appellants.

v.

MUNICIPAL COURT

R. H. CARY,

Appellee.

OF CHICAGO.

302 I.A. 534

MR. JUSTICE MARK DELIVERED THE OPINION OF THE COURT.

On March 11, 1936, Charles A. Coey and Carrie H. Coey, his wife, plaintiffs, filed their statement of claim in the Municipal Court of Chicago and therein averred that they were the owners of the real estate located at 3101 South Hoyne Avenue, Chicago, and that they were engaged in improving the same with a residence; that R. H. Cary, defendant, in an effort to sell them a heating plant, secured their consent to demonstrate a hot air furnace, using oil for fuel; that defendant installed a hot air furnace and an oil burner and operated the same at low heat without the blower attached during the time the plastering and interior work was being completed; that the heating plant so installed was defective in that it discharged carbon into the hot air ducts, causing the interior walls to become soiled; that defendant was notified of the condition and requested to indemnify plaintiffs against any damage which might be sustained by reason of the carbon at the time the oil burner should be turned on fully and the blower attached; that defendant refused to indemnify the plaintiffs; that defendant went on the premises on February 20, 1936, and in the absence of plaintiffs and without their consent, turned on the oil burner fully and attached the blower, which caused a great quantity of carbon dust and dirt to be discharged in and about the interior of the building and to be secured upon the walls and plastering of the premises, causing damage in the sum of \$350.00. Plaintiffs claim further damage of \$300.00, which would

YOUNG • 2210141 New York • 1-14-1975

• *Journal of Management Education*

• UNITED STATES GOVERNMENT PRINTING OFFICE •

Legislation and its effect on government and society, particularly in the area of

ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED DATE 02-10-2009 BY 60322 UCBAW/STP

CONFIDENTIAL

114 115

blackened - then into the hot air duct, causing the interior walls

to begin with, you have a different financial situation

turned on fully and the blow-off closed; but before the return

www.douglas-irving.com

at Springfield, N.C. and Hill has been working to eliminate drugs in schools.

To view all of these videos, including all 10 interviews, has access

ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED

3

have to be expended in and about cleaning the carbon and dirt from the hot air ducts in the premises, hence, plaintiffs ask damages in the sum of \$650.00.

Defendant filed an affidavit of defense and a counterclaim. The affidavit of defense alleged that on or about December 3, 1935, the parties entered into an agreement, in words and figures as follows:

"Confirming our verbal agreement, we are to furnish and deliver to your new residence at 31st and Moyne, a Gary Forced Air furnace #F P 3 A, together with a Blower, Humidifier and Filter Cabinet, (sufficient size to heat your residence and garage.) we also to furnish and install complete two 375 gal. oil storage tanks.

"We include cleaning of your burner now located at the Synell Plant and the installing of same at the residence. Also the installing of the thermostat and float box from the old job. The piping for water to be done by others. We do not include any electrical work except for the thermostat; nor the setting of furnace blower or motor or filter cabinet; nor any sheet metal work or stack or registers; nor permits.

"We are to take back from you and have given you credit therefor, the heat saver and blower from your old job. We are to receive for the above the net sum of Five Hundred and Eighty Dollars (\$580.00). Upon receipt of the equipment from the Gary Mfg. Co., we will install a temporary burner for heating the house during construction.

"Within ten days after delivery of the furnace and blower and tanks and temporary installation, we are to receive five Hundred Dollars (\$500.00) cash on account, balance to be paid upon completion of installation.

"Any parts which prove defective in material or workmanship within one year, will be replaced free of charge. Also service will be given free on 5 service tickets, good within a year from the date burner was installed. During this time you are to purchase oil from Superior Oil Co. or other company, acceptable to us, and use # 1 oil."

that he carried out all the terms and conditions of the agreement and was entitled to be compensated therefor in the sum of \$580.00, together with other sums due and owing from plaintiff, and he denied that the heating plant was defective in construction, design, operation or installation, or in any other respect; denied that the heating plant discharged carbon; denied that on February 20, 1936, in the absence of plaintiffs and without their consent, he so operated the heating system that it caused a great amount of carbon dust to

be discharged in the interior of the building, thereby damaging the walls and plastering of the premises, and denied that any damage at all was caused as alleged by plaintiffs. The counterclaim alleged that on or about December 2, 1935, the agreement above recited was entered into; that thereafter he fully performed the same in all respects and that thereupon there became due and payable to him the sum of \$500.00; that in addition to such sum there was also due him from plaintiffs the further sum of \$185.00 for the new burner by him installed in the premises at the special instance and request of plaintiffs, who promised to pay him the said sum of \$185.00 on demand; that there was also due him the sum of \$10.00 from plaintiffs for connecting up the electrical switch and thermostat at their special instance and request and upon their promise to pay therefor; that there was also due the sum of \$5.00 for the hot water coil furnished by defendant to plaintiffs at their special instance and request and upon their promise to pay therefor; that the claims for \$185.00, \$10.00 and \$5.00 are in addition to the \$500.00, which plaintiffs owe him; that the agreements for the additional sums were made subsequent to and by way of modification of the original agreement of December 2, 1935; that there was also due him from plaintiffs the sum of \$75.00, being the value of the old blower and heat sever, mentioned in the third paragraph of the agreement of December 2, 1935, which, according to the terms of the agreement, was to be taken back by defendant and for that reason the agreed sum of \$75.00 was deducted by defendant from the cost of said installation before arriving at the net amount of \$500.00; that contrary to the intentions of the parties, the old blower and old heat sever were appropriated by plaintiffs to their own use and have not been returned or delivered by him; that on that account plaintiffs owe him the additional sum of \$75.00; that on December 2, 1935, he entered into an oral agreement with plaintiffs, separate

be damaged in the interior of the building, thereby rendering
the walls and glazing of the premises, and stating that any
damage to all was caused as alleged by plaintiff. The defendant
alleges that on or about December 1, 1938, the agreement above
recited was entered into; that thereafter he fully performed the
same in all respects and that defendant thereupon paid and tendered
to him the sum of \$250.00; that in addition to each and every
also the his from plaintiff the further sum of \$125.00 for the new
payers by him installed in the premises at the special instance and
request of plaintiff, who promised to pay him the said sum of
\$125.00 on demand; that there was also the sum of \$125.00
from plaintiff for connecting up the electrical wiring and plumbing
at their special instance and request and upon their promise to pay
therefor; that there was also the sum of \$25.00 for the hot water
bill furnished by defendant to plaintiff as their special instance
and request and upon their promise to pay therefor; that the claims
for \$125.00, \$125.00 and \$25.00 are in addition to the \$250.00, which
plaintiff owes him; that the agreement for the additional sums
was made subsequent to and by way of modification of the original
agreement of December 1, 1938; that there was also due him from
plaintiff the sum of \$75.00, being the value of the old glass and
board cover, mentioned in the third paragraph of the agreement of
December 1, 1938, which, according to the terms of the agreement,
was to be taken back by defendant and the said reason the agreed
sum of \$75.00 was deducted by defendant from the said sum of \$250.00;
that plaintiff before arriving at the net amount of \$250.00; that
defendant in the agreement at the meeting, the said plaintiff and his
agent were represented by plaintiff to credit with him and
have not been returned or delivered up him; that he has received
plaintiff owe him the additional sum of \$75.00; that on December 1,
1938, he and the two men in suit agreement with plaintiff, represent

and supplemental to the principal agreement heretofore set out; that by the terms and conditions of the supplemental oral agreement, defendant, at the special instance and request of plaintiffs, agreed to furnish layouts, schedules, drawings and specifications for the entire installation of the sheet metal duct work in conjunction with the sheet metal work to be installed by sheet metal contractors in the premises in conjunction with the heating equipment specified in the principal agreement; that defendant, under the supplemental agreement, was also to furnish supervision of the installation of the sheet metal duct work; that in consideration of the performance of the service provided for in the supplemental agreement, plaintiffs agreed to pay him the sum of \$300.00; that all of the services agreed to be performed were fully and satisfactorily performed, and he claimed damages in the sum of \$1,056.00.

Plaintiffs filed an affidavit of defense to the counter-claim, which joined issue on virtually all of the allegations. The case was tried before the court without a jury, and on July 25, 1938, the court found the issues against plaintiffs and in favor of defendant, and assessed damages at the sum of \$1,041.00, and entered judgment against plaintiffs. On August 24, 1938, the plaintiffs presented a written motion asking the court to vacate the judgment. On August 29, 1938, the court overruled the motion to vacate. This appeal followed.

The first point discussed by plaintiffs is that the defendant failed to prove that the minds of the parties met upon the terms and conditions of the agreement. The evidence introduced at the trial is quite voluminous. Without stating the evidence in detail, it will suffice for us to say that we have given it careful consideration. There is a sharp conflict in the testimony. The decision as to whether the agreement had been established by a preponderance of the evidence necessarily depended upon the credence

and recommended to the principal witnesses and that
 that by the terms and conditions of the employment and agreement,
 defendant, at the special instance and request of plaintiff, agreed
 to furnish plaintiff, defendant, witnesses and beneficiaries the same
 entire installation at the above stated time and in conformity
 with the above stated work to be installed by above stated contractor
 in the premises in conformity with the existing equipment specified
 in the original agreement; that defendant, under the employment
 agreement, was also to furnish supervision of the installation of
 the above stated work; that in consideration of the performance
 of the duties herein set forth in the employment agreement, plaintiff
 agreed to pay him the sum of \$200,000; that all of the duties herein
 to be performed were fully and satisfactorily performed, and he
 received payment in full of \$200,000.

Plaintiff filed an affidavit of defense to the counter-
 claim, which stated that he was not a party to the agreement, and
 was not bound by the terms and conditions thereof, and that he was
 the owner of the premises, and that he was not a party to the agreement,
 and suggested damages of the sum of \$100,000, and suggested
 interest against plaintiff, on a basis of 10%, and plaintiff
 presented a motion to set aside the verdict in favor of defendant,
 and suggested that the motion be granted. This
 motion followed.

The first motion of plaintiff in favor of
 defendant failed to show that the terms of the contract were not
 terms and conditions of the agreement. The motion was denied.
 The trial is now resumed. Without adding the evidence in
 detail, it will suffice for us to say that as given in detail
 testimony. There is a sharp conflict in the testimony. The
 motion to be granted the agreement was not established by a pre-
 ponderance of the evidence necessarily required upon the issue.

that the trial court gave to the testimony of the witnesses. The trial judge had an opportunity to observe the witnesses and was in a better position than this court to determine the credibility to be accorded to their testimony. In the state of the record that is disclosed, we are not warranted in disturbing his determination that a valid contract was entered into between the parties. The agreement was in writing, but was not signed by plaintiffs. There is evidence from which the court had the right to conclude that even though plaintiffs did not sign the agreement, they accepted the terms thereof.

The second objection leveled at the judgment is that defendant cannot recover "under its theory of quantum meruit". It is plain from an examination of the record that defendant did not attempt to recover on the basis of a quantum meruit. He sought recovery on the basis of a parol contract.

Finally, plaintiffs assail the judgment by saying that the defendant "having installed his furnace in plaintiff's residence to demonstrate its fitness to the satisfaction of plaintiffs as an inducement to obtaining a sale of same, cannot obtain the value thereof or cost of making the demonstration in the absence of proof that same proved satisfactory and a sale was made. The risk of plaintiffs being satisfied and thereafter consummating a purchase is entirely upon defendant." The first point discussed covers this proposition. We have held that there is evidence in the record which justified the court in finding that the parties made agreements as contended by defendant. We agree with plaintiffs that if the arrangement made contemplated that defendant was to install the heating plant for the purpose of demonstrating its fitness as an inducement to procuring a sale, and that after such demonstration plaintiffs did not decide to make the purchase, then defendant could not recover. However, the trial court found against plaintiffs on that issue.

that the trial court gave to the testimony of the witnesses. The trial judge had no opportunity to hear the witnesses and was in a better position than this court to determine the credibility of the witnesses in their testimony. In the case of the witness that is disclosed, we are not concerned in determining his determination that a valid contract was entered into between the parties. The agreement was in writing, but was not signed by defendant. There is evidence from which the court had the right to conclude that even though plaintiff did not sign the agreement, they executed the same jointly. The second objection leveled at the judgment is that defendant cannot recover under the theory of quasi-contract. It is said that an examination of the record that defendant did not attempt to recover on the basis of a quasi-contract. He sought recovery on the basis of a quasi-contract. Finally, defendant seeks the judgment by saying that the defendant having installed the furnace in plaintiff's residence to demonstrate the fitness of the installation of defendant's as an inducement to obtaining a sale of coal, cannot claim the value thereof on account of making the demonstration in the absence of proof that some contract was made and a sale was made. The risk of defendant being installed and defendant's demonstrating a furnace is entirely upon defendant. The first contract defendant entered into is nullified. We now hold that there is evidence in the record which justified the court in finding that the parties were estopped to contend by defendant. We agree with plaintiff's view of the agreement, and we emphasize that defendant was to install the furnace for the purpose of demonstrating the fitness of its furnace as an inducement to obtaining a sale, and that after such demonstration plaintiff did not desire to enter the furnace, then defendant could not recover. Finally, the trial court found plaintiff entitled to the same.

6

The dispute between the parties as to whether the agreement was carried out by defendant, resolved itself into a matter of the view that the court took as to the credibility of the witnesses. We are of the opinion that there was evidence in the record which justified the court in deciding that the defendant performed the agreement. The discussion as to the making and performance of the principal agreement applies with equal force to the making and performance of the supplemental agreement.

For the reasons stated, the judgment of the Municipal Court of Chicago is affirmed.

JUDGMENT AFFIRMED.

DENIS E. SULLIVAN, P.J. AND HEBEL, J. CONCUR.

The dispute between the parties as to whether the agreement was carried out by defendant, provided itself with a matter of the view that the court took as to the credibility of the witnesses. On view of the opinion that there was evidence in the record which justified the court in finding that the defendant performed the agreement. The testimony as to the making and performance of the agreement appears within each issue as the called and performance of the employment agreement. For the reasons stated, the judgment of the majority court of appeals is affirmed.

JUDGMENT AFFIRMED.

WILLIAM F. BELL, JR., for plaintiff.

40898

MARTIN J. HECHT, INC.,

Appellee,

v.

FRANK STEIGERWALD,

Appellant.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

302 I.A. 556

MR. JUSTICE SHARKE DELIVERED THE OPINION OF THE COURT.

On April 21, 1938, plaintiff filed a three count complaint against defendant in the Circuit Court of Cook County. The first count averred "that the defendant has collected the sum of \$3,172.18 upon open accounts belonging to the plaintiff and which money the defendant fraudulently and tortiously appropriated to his own use, and he has failed to account therefor, and still fails to account. wherefore, plaintiff prays judgment against the defendant in the amount of \$3,500.00 for the malicious withholding of said sum of money." The answered answer of defendant denied the allegations of the complaint and alleged that plaintiff and defendant entered into a contract for the period of one year whereby defendant was to receive a sum of \$75.00 per week, which was to be charged against him for commissions; that on all sales of fur garments made by the defendant, plaintiff was to receive the cost of the garments plus 20% over and above the said costs, and the balance, if any, to be credited to the account of defendant; that on all orders taken by defendant for repairs and alterations of fur garments the plaintiff was to receive 20% over and above the actual costs of materials and labor, and the balance, if any, was to be credited to the account of the defendant; that on all storage and cleaning jobs secured by defendant, the defendant was to receive 50% of the charges made thereon. The defendant further alleged that plaintiff has failed and refused to account to him although defendant repeatedly demanded the sums of money collected by plaintiff under the said agreement for commissions,

308 I.A. 568

On April 11, 1938, Plaintiff filed a three count complaint against defendant in the Circuit Court of Cook County, Illinois. Count one averred that the defendant has collected the sum of \$2,175.12 from open accounts belonging to the plaintiff and which money the defendant fraudulently and intentionally converted to his own use, and he has failed to account therefor, and still fails to account. Therefore, plaintiff prays judgment against the defendant in the amount of \$2,175.12 for the malicious withholding of said sum of money. The second count of defendant during the allegations of the complaint and alleged that plaintiff and defendant entered into a contract for the period of one year whereby defendant was to receive a sum of \$75.00 per week, which was to be charged against his for commissions; that on all sales of fur garments made by the defendant, plaintiff was to receive the cost of the garments plus 25% over and above the said cost, and the balance, if any, to be credited to the account of defendant; that on all orders taken by defendant for repairs and alterations of fur garments the plaintiff was to receive 25% over and above the actual cost of materials and labor, and the balance, if any, was to be credited to the account of the defendant; that on all repairs and cleaning jobs accepted by defendant, the defendant was to receive 50% of the charges with balance. The defendant further alleged that plaintiff has failed and refused to account to him although defendant repeatedly demanded the sum of money collected by plaintiff under the said agreement for commissions.

2

and that plaintiff is indebted to defendant in the sum of \$4,000.00. Defendant in his brief calls the latter part of the answer a setoff. However, there is no prayer for relief. Plaintiff replied to the amended answer in which it denied that all the money collected by the defendant for the account of plaintiff was turned over to the plaintiff; that the defendant kept large sums of money which were turned over to him for the account of the plaintiff fraudulently and tortiously and with intent and design to defraud the plaintiff out of the sums of money due him; and that the defendant failed to properly account to the plaintiff for all sums of money collected by the defendant, which belongs to the plaintiff. Defendant filed an amended answer and cross complaint for an accounting, which cross complaint alleged that the parties entered into a contract as described in the amended answer; that plaintiff agreed to account to defendant for all commissions earned by plaintiff under the contract; that defendant repeatedly demanded an accounting from plaintiff, but plaintiff refused to do so; that the defendant was unable to state the amount that was due to him because all the books and records were in the possession of the plaintiff; that an order be entered requiring the plaintiff to render a true and full accounting of the moneys so received by him under the terms of the said contract; that a judgment be entered for the defendant for any sum or balance found to be due him from the plaintiff and the defendant have such other and further relief as may be just. The cross complaint alleged, in addition to the matters set out in the complaint, that the defendant was permitted to carry on his own business independently in the establishment of Martin J. Hecht, Inc., a corporation; that for the use of the space in plaintiff's place of business, he was to pay the plaintiff as hereinbefore set forth in the contract; that the plaintiff furnished the defendant's customers with an inferior grade of fur and that thereafter the defendant

and that plaintiff is indebted to defendant in the sum of \$10,000.00.
Defendant in his brief calls the latter part of the account a
check. However, there is no paper on which the money was
to the amount of \$10,000.00 in which it is stated that all the money collected
by the defendant for the account of plaintiff was turned over to
the plaintiff; that the defendant kept large sums of money which
were turned over to him for the account of the plaintiff; that plaintiff
had previously and also later and again to deliver the plaintiff
out of the sums of money due him; and that the defendant failed
to properly account to the plaintiff for all sums of money collected
by the defendant, which belongs to the plaintiff. Defendant filed
an amended answer and cross complaint for an accounting, which
states defendant alleged that the parties entered into a contract
as described in the amended answer; that plaintiff agreed to receive
in return for all consideration secured by plaintiff under the
contract; that defendant wrongfully demanded an accounting from
plaintiff, but plaintiff refused to do so; that the defendant was
unable to state the amount that was due to him because all the books
and records were in the possession of the plaintiff; that on or about
he entered receiving the plaintiff in return a sum and full account-
ing of the money so received by him under the terms of the said
contract; that a judgment be entered for the defendant for any sum
or balance found to be due him from the plaintiff and the defendant
have each other and further relief as may be just. The cross
complaint alleged, in addition to the matters set out in the amended
answer, that the defendant was indebted to plaintiff in the sum of \$10,000.00
interestably in the establishment of North J. Moore, Inc., a
corporation; that for the use of the sum in plaintiff's check of
\$10,000.00, he was to pay the plaintiff as representative and agent in
the contract; that the plaintiff furnished the defendant's money
with an interest of 10% per annum and that thereafter the defendant

3

was compelled to allow the said customers the full amount of the purchase price to the damage of defendant; that plaintiff replaced good, valuable mink skins belonging to a customer of the defendant with cheap skins and that the defendant was compelled to replace the same to the damage of the defendant; that plaintiff failed to return a number of fur garments belonging to customers of the defendant and that the defendant was compelled to provide new garments or pay for the same to the damage of defendant. Plaintiff moved to strike the defendant's amended answer. The motion to strike was carried back to plaintiff's complaint and was sustained as to the third count. The motion to strike defendant's amended answer was overruled. The cause was tried by the court without a jury. On January 28, 1939, the court entered the following order:

"Thereupon the Court proceeds to hear further evidence adduced herein and after hearing all the evidence adduced and being fully advised in the premises finds the issues against the defendant on his claim of set-off; and further finds the issues in favor of the plaintiff for the sum of \$1,981.00 in tort.

"Therefore it is considered by the court that the plaintiff do have and recover of and from the defendant, Frank Steigerwald, its said damages of \$1,981.00 in form as aforesaid by the court assessed together with its costs and charges in this behalf expended and have execution therefor.

"Thereupon the defendant enters herein his motion to vacate the foregoing order which said motion is hereby entered of record and continued February 3, A. D. 1939, at two PM.

"Thereupon on motion of plaintiff it is ordered that count two of plaintiff's complaint be and the case is hereby dismissed."

On February 3, 1939, the court entered the following order:

"This cause coming on to be heard upon a motion to vacate the judgment heretofore entered herein, and both parties to the cause being represented by counsel, and the court being fully advised in the premises, after having heard arguments of counsel, and having considered the evidence introduced, doth order:

"(1) That the finding and judgment entered January 28, 1939, be and the same is hereby vacated, set aside and wholly for naught esteemed, and the court having tried the case without a jury, and having heard the testimony of witnesses of both the plaintiff and defendant, and having considered the documentary evidence introduced on the trial and having heard arguments of counsel for the plaintiff and the defendant and being fully advised in the premises, finds:

1

[illegible]

"(a) That the defendant, Frank Steigerwald, wilfully, maliciously, tortiously and fraudulently converted to his own use the sum of Nineteen Hundred Eighty One Dollars (\$1981.00) the money and property of the plaintiff, Martin J. Hecht, Inc., a corporation, with the intent to cheat and defraud the plaintiff out of the same, and the Court doth assess the plaintiff's damages at said sum of Nineteen Hundred Eighty One Dollars (\$1981.00) and the Court finds the issues in favor of the plaintiff on the cross-complaint filed by the defendant against the plaintiff.

"It is therefore, ordered and adjudged that the plaintiff, Martin J. Hecht, Inc., a corporation, do have and recover from the defendant, Frank Steigerwald, the sum of Nineteen Hundred Eighty One Dollars (\$1981.00) together with all its costs in this behalf expended, to be taxed by the Clerk of the Court.

"(2) That as to the counter-claim filed by the defendant, the defendant take nothing by his said counter-claim, and that the plaintiff, Martin J. Hecht, Inc., a corporation, on said counter-claim go hence without day.

"It is further ordered that on motion of the plaintiff Count II of the complaint be and the same is hereby dismissed.

"It is further ordered that the Clerk of this court is hereby directed to issue a capias ad satisfaciendum against the defendant, Frank Steigerwald, directed to the Sheriff of Cook County, to be by him executed according to law."

From the latter order, defendant prosecutes this appeal.

The first point urged by defendant is that the trial court erred in arbitrarily vacating a finding and judgment entered on January 28, 1939, and entering a new finding and judgment substantially different from the former on February 3, 1939. In support of this contention, defendant relies on paragraph 7, section 80, of the Civil Practice Act, (Section 174, chapter 110, Ill. Rev. Stat. 1939), which reads that "the court may in its discretion before final judgment, set aside any default, and may within thirty days after entry thereof set aside any judgment or decree upon good cause shown by affidavit, upon such terms and conditions as shall be reasonable." The record does not show that defendant raised any objection because of the absence of an affidavit at the time the court considered the entry of the second judgment order. It will be observed that Section 89 of the Civil Practice Act, (Section 193, Chapter 110, Ill. Rev. Stat. 1939) provides that whenever in any proceeding evidence shall be necessary

5

concerning any fact which, according to law and the practice of the court, may be supplied by affidavit, the court may, in its discretion, require such evidence to be presented, wholly or in part, by oral examination of the witnesses in open court. We must assume that the court acted in accordance with the law. The record does not purport to be complete and does not show that the court did not hear evidence or listen to statements of counsel which took the place of evidence. The first point urged, therefore, is not valid. The defendant could not complain for the further reason that he moved to vacate the judgment. It is clear that the making of his motion retained the matter within the bosom of the court for further consideration.

The second point urged is that the court erred in finding against defendant on his cross complaint for an accounting in equity in the second judgment because the first judgment contained no finding on the cross complaint for an accounting in equity and there was no evidence heard by the trial court between January 18th and February 3rd upon which the court could make such finding. Our comment as to the first point disposes of the second point. However, we have carefully examined the pleadings and are satisfied that what the defendant calls the setoff and counter claim are substantially the same. In the first judgment, the court ruled against defendant on the setoff. It is apparent that what the court had in mind was the cross complaint in equity.

As a third point, defendant urges that the second judgment is void because it is not supported by the pleadings and is in fatal variance with the same. In our opinion, the second judgment is in accordance with the pleadings and is not at variance with the same. Defendant also insists that the court erred in entering a judgment in tort where the liability, if any, arises out of a breach of a purely contractual duty. An examination of the pleadings discloses that malice is the gist of the action sued upon. In

[illegible]

the case of Greener v. Brown, 223 Ill. 221, certain accounts receivable were sold to the plaintiff, which the defendant was to collect and turn the proceeds over to plaintiff. The court said:

"The sole question controverted in this court, under the pleadings, is whether malice was the gist of the action. The jury in the circuit court found plaintiff in error was guilty of conversion. The action was one in tort based on fraudulent conversion. Malice, as that term is used in cases of this character, does not necessarily mean hatred or ill-will, but pertains to wrongs which are inflicted with an evil intent, design or purpose. Such malice may be shown by showing that the guilty party was actuated by dishonest motives with intent to perpetrate an injury. (Money v. Knight, 232 Ill. 306; Kitson v. Farwell, 134 id. 327; First Nat. Bank of Flora v. Burkett, 101 id. 391.) This is the 'gist of the action' which constitutes the basis of the suit and without which the suit could not be maintainable. It is the essential ground or object of the suit, without which there is not a cause of action. (Jernberg v. Mix, 193 Ill. 254.) The case alleged in the declaration was one charging malice and not merely an action for the recovery of money. Malice was therefore the gist of the action and the causae ad satisfaciendum was properly issued."

The Fifth point is that the pleadings are insufficient upon which to base the issuance of a causae ad satisfaciendum. In our opinion, the pleadings are sufficient on which to base a judgment in tort and on which a causae ad satisfaciendum could issue. The court did not bring before us a report of the proceedings at the trial. Therefore, we are not called upon to determine whether the evidence warranted the finding and judgment.

Finally, defendant recalls the judgments as nullities "because it is impossible to determine upon which count the trial court entered the judgments." On entering the judgment of February 3, 1939, the court permitted the defendant to dismiss the second count of his complaint. Under Section 59 of the Civil Practice Act, (Section 176, Chapter 110, Ill. Rev. Stat. 1939) the court had a right to permit the dismissal of the second count. Therefore, it is plain that the judgment is founded upon the first count of the complaint.

On July 13, 1939, appellee presented a motion suggesting the death of appellant, and accompanied the motion by an affidavit showing that appellant died on July 3, 1939. On July 14, 1939, the suggestion of the death of appellant was entered of record. When and if an administrator, executor or heir is substituted as a defendant, it is manifest that a causa ad satisfaciendum cannot be issued against such substituted defendant.

For the reasons stated, the judgment of the Circuit Court of Cook County is affirmed. While affirming the judgment, in view of the fact that no one has been substituted for the deceased, we cannot at this time enter a judgment for costs.

JUDGMENT AFFIRMED.

HERBIL. J. AND DENIS E. SULLIVAN, P.J. CONCUR.

On July 12, 1944, the following was received from the
 the date of receipt, and accompanied the letter by an affidavit
 stating that the following was the result of the investigation
 the execution of the death of the person named in the
 and that it is believed, based on the evidence as
 presented, that the person named in the affidavit is
 the same person as the person named in the affidavit
 for the person named in the affidavit of the person named
 at the time of the execution, and that the person named in the
 affidavit is the same person as the person named in the affidavit
 at the time of the execution.

Very respectfully,
 [Signature]

WITNESSES:
 [Signature]

40702

PEOPLE ex rel., ALBERT F. WEBB,

Appellee,

v.

WILLIAM F. PROPPER, Supervisor of the Town of Thornton, of the County of Cook and State of Illinois, and ex officio Township Treasurer and ex officio Overseer of the Poor of said Township; WILLIAM M. WINTERHOFF, Clerk of said Town; JACOB P. DEYOUNG, Justice of the Peace of said Town; ARTHUR E. BILLNER, Justice of the Peace of said Town; WILLIAM F. DONAHUE, Justice of the Peace of said Town; WILLIAM JACOB, Justice of the Peace of said Town; FRANK L. KAMINSKI, Justice of the Peace of the said Town,

Defendants.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

302 I.A. 557

On Appeal of WILLIAM M. WINTERHOFF, Clerk of said Town; JACOB P. DEYOUNG, Justice of the Peace of said Town; ARTHUR E. BILLNER, Justice of the Peace of said Town; WILLIAM F. DONAHUE, Justice of the Peace of said Town; WILLIAM JACOB, Justice of the Peace of said Town; FRANK L. KAMINSKI, Justice of the Peace of said Town,

Appellants.

MR. JUSTICE BURKE DELIVERED THE OPINION OF THE COURT.

At the annual meeting of the electors of the Township of Thornton, held on April 5, 1938, three resolutions were adopted. The first provided for the payment of office rent for the members of the Board of Town Auditors, for stenographic hire for Supervisor and Town Clerk of the township; for fees and expenses of the Board of Town Auditors in attending meetings, and a lump levy providing for the payment of dues and expenses in state and county associations of township officials. The second resolution provided that all checks issued by the Township Supervisor as ex officio Treasurer of the township should be countersigned by the Highway Commissioner on checks drawn against the Road and Bridge Fund and by the Town Clerk for checks drawn on all other funds. The third resolution provided that all poor relief orders issued by the Township

Supervisor as ex officio Overseer of the Poor should be audited by the Board of Auditors of the township and the certificate of correctness or rejection attached thereto; that the claims so certified should be deposited in the Office of the Town Clerk, who should then issue a voucher for the payment of the proved claims to the Treasurer in the manner that other township claims are paid. The relator, as a resident, citizen, tax payer and voter of the township, filed a complaint in chancery in the Circuit Court on April 19, 1938, and prayed for an injunction restraining the various officers involved from carrying out the provisions of the resolutions. The complaint also asked that the court enter a decree declaring each of the resolutions illegal and void. The attorney for the relator served notice on all interested parties that he would appear before the court on April 21, 1938, and ask for the issuance of a temporary writ of injunction in accordance with the prayer of the complaint. The parties appeared before the court on April 21, 1938. At that time the action was continued. Subsequently, all defendants except William F. Frepper, Supervisor of the Town of Thornton, and ex officio Township Treasurer and ex officio Overseer of the Poor, filed an answer, which, in substance, asserted the validity of the resolutions. Mr. Frepper, in his official capacity, filed an answer in which he expresses the belief that the injunction should issue, as prayed for by the relator. The record does not show that a temporary injunction was granted. However, it is apparent that the parties agreed to withhold acting under the resolutions until the court has passed upon the matters in issue. The matter was heard before the chancellor on the complaint and the answer thereto. The facts are not in dispute. On December 8, 1938, the chancellor entered a decree wherein he found that the allegations of the complaint correctly set forth the

Supervisor as an official business of the town should be subject to
the board of directors of the township and the residents of
consequence or rejection of the board; that the board of
directors should be composed of the officers of the town, the
board should have a number for the payment of the taxes and
the township in the manner that other township claim and wish
the board, as a township, should, not pay and vote of the
board, filed a complaint in township in the district court on
April 15, 1935, and prayed for an injunction restraining the
board from involving them in paying out the provisions of the
resolution. The complaint also stated that the board under a
motion made by each of the resolutions filed and vote. The
attorney for the board stated that on all interested parties
that he would appear before the court on April 15, 1935, and ask
the issuance of a temporary writ of injunction in accordance
with the prayer of the complaint. The parties appeared before the
court on April 15, 1935. It was then the action was continued.
Subsequently, all interested parties William F. Brown, Supervisor
of the town of Madison, and as official business of the town and
as official business of the town, filed an answer, which is attached,
and stated the validity of the resolutions. Mr. Brown, in his
answer, filed an answer in which he stated the belief
that the resolutions should stand, as prayed for by the board. The
board does not show that a temporary injunction was granted.
However, it is apparent that the board stated in its answer
under the resolutions until the court has passed upon the matter
in issue. The matter was heard before the court on the con-
plaint and the answer thereto. The facts are not in dispute. On
November 5, 1935, the court entered a decree wherein it found
that the allegations of the complaint were not true and

rights, powers and duties of the defendants, and that the resolutions adopted were null and void, except Section 3 of resolution No. 1. The decree permanently enjoined the defendants from in any manner interfering with the Supervisor of the Township as ex officio Treasurer and ex officio Overseer of the Poor. The defendants, except William F. Fropper, prosecuted this appeal from the decree. On April 13, 1939, the attorney for William F. Fropper presented his motion asking that the appeal be dismissed on the ground that on April 4, 1939, at the annual meeting of the electors of the township, resolutions were adopted repealing the three resolutions assailed in the instant case. Attached to the motion presented to us, are copies of the resolutions adopted by the electors on April 4, 1939. The relator did not file any objections to the motion to dismiss. The other defendants filed objections to the motion, urging three points. The first is that resolution No. 1 expired by its own limitations prior to the annual meeting held on April 4, 1939, and that, therefore, such resolution could not be repealed at the annual meeting. It does not appear that any persons were hired, any premises rented, or any expenditures made or contracted for under this resolution. The second point urged in opposition to the motion to dismiss is that Mr. Fropper has not attached to the motion duly authenticated copies of the resolutions passed by the electors at the annual meeting held on April 4, 1939. Nowhere is it disputed that such resolutions were adopted. The only point made is that the copies submitted to us are not properly authenticated. The final criticism leveled at the motion to dismiss is that the resolutions adopted at the annual meeting held on April 4, 1939, are "based upon a decision by Judge Frydalski of the Circuit Court of Cook County, which these defendants claim is erroneous. Resolution No. 3 which

[illegible]

is on appeal in this Court and which was allegedly repealed by the electors of Thornton Township at the annual meeting held on April 4, 1939, is in conformity with the statutes in such case made and approved, and the allegedly repealing resolution attached to the motion of William F. Frepper is illegal and void." The motives that actuated the electors in adopting the repealing resolutions are immaterial. The important fact is that they did adopt the resolutions. The objection states that the "repealing resolution" attached to the motion is illegal and void. Defendants did not present any countersuggestions and did not enlighten us as to why the repealing resolutions are void.

No good reason has been shown as to why the action of the electors in adopting the repealing resolutions was not proper. We are of the opinion that because of the adoption of the repealing resolutions, the matters presented in the briefs are moot questions. For that reason, the appeal should be and it is dismissed without costs to either side.

APPEAL DISMISSED WITHOUT
COSTS TO EITHER SIDE.

DENIS E. SULLIVAN, F.J. AND HEREL, J. CONCUR.

It is stated in this report that the following resolution was adopted by the officers of the National Association of Manufacturers on April 4, 1914, in connection with the election of officers and directors, and the following resolution was adopted by the officers of the National Association of Manufacturers on April 4, 1914, in connection with the election of officers and directors: "The officers of the National Association of Manufacturers are hereby authorized to take such action as they may deem proper in connection with the election of officers and directors." The resolution was adopted by a vote of 100 to 0.

It is further stated in this report that the following resolution was adopted by the officers of the National Association of Manufacturers on April 4, 1914, in connection with the election of officers and directors: "The officers of the National Association of Manufacturers are hereby authorized to take such action as they may deem proper in connection with the election of officers and directors." The resolution was adopted by a vote of 100 to 0.

OFFICE OF THE SECRETARY
WASHINGTON, D. C.

CHIEF OF BUREAU, U. S. DEPARTMENT OF COMMERCE

40721

JOHN ZUNCIO, STEVE ZUNCIO and
JOHN BABOTA,

Plaintiffs - Appellees,

v.

JAN FRANO, VEDOLAV BERA and VEDOLAVADI
A PODPORUJICI SPOLEK "YLOVA", also
known as EDUCATIONAL AND BENEVOLENT
SOCIETY "YLOVA" OF CHICAGO, ILLINOIS,

Defendants - Appellants.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

302 I.A. 557²

MR. JUSTICE BURKE DELIVERED THE OPINION OF THE COURT.

On April 25, 1936, the Secretary of State issued a charter to Vedolavadi A Podporujici Spolek "Ylova" of Chicago, Illinois, (Educational and Benevolent Society "Ylova" of Chicago, Illinois.) It was formed for the purpose of "mutual assistance, and support of its members in cases of sickness, need or death, by voluntary, benevolent and free contributions by its members and also to elevate morally and educate its members by engendering and fostering love of this country and of mankind in general, and by educational instructions, lectures and entertainments." The society adopted by-laws, Article 10 of which govern the suspension and expulsion of members. Paragraph 3 of Article 10 provides that a member who has acted immorally may be expelled. Paragraph 5 provides that "a member who without any specific reason, which he can prove, abuses or slanders officers or members of the society" may be expelled. Paragraphs 7 and 8 provide that:

"Any offense of the by-laws or society by a member should be announced at a regular meeting, at which time a committee of three shall be elected to thoroughly investigate the matter and report findings at the following meeting.

The recording secretary shall notify a suspended member of his expulsion."

Persons of either sex between the ages of 18 and 40 years of Czech extraction from Jugoslavia, are eligible to membership. The spouse of a member may also join, providing he or she speaks the Czech

language. In July, 1934, the society had about 250 members. On February 9, 1933, John Muncie and Steve Muncie became members, and on February 14, 1933, John Sabota became a member. They are the plaintiffs. Jan Franc, Rudolph Frohaska, Fred Secha, Anton Vleck, Vaclav Tucek and Vaclav Seba, as well as the plaintiffs, were members of the society in July, 1934. A benefit certificate was issued to each of the plaintiffs, which provides for the payment of a death benefit in the sum of \$100.00 to a designated beneficiary. In addition, the by-laws provide that each member is entitled to sick benefits at the rate of \$2.50 per week for a maximum of ten weeks in each year. At a regular meeting of the society held on July 13, 1934, in a hall located at 18th and May Streets, Chicago, Rudolph Frohaska presided. Forty six members attended. In the course of the meeting, Joseph Lacina stated that on Sunday, July 1, 1934, he was "attacked and beaten up in Willow Springs in the forest by brothers John Sabota, Stephen Muncie and John Muncie", plaintiffs herein, and that the attack took place at an outing given by a sports club. He requested that the three plaintiffs be expelled from the society. Sabota protested that the occurrence had nothing to do with the society, and declared that Lacina should not have been at the outing, not having been invited; that he, Lacina, had not made any donation towards the expenses; that Lacina was asked to leave; that he did not obey and that a fight ensued. The presiding officer asserted that the society was concerned in the incident as Lacina had to be treated by a physician and the society was required to pay him, Lacina, a sick benefit. A debate followed in which the fracas in the forest was thoroughly discussed. Sabota argued that the society had no right to try them. It was then decided to vote by ballot on the proposition as to whether the three plaintiffs,

January 2. In July, 1884, the society had about 200 members. On February 3, 1887, John Smith and Mary Smith became members, and on February 14, 1887, John Smith became a member. They are the first. John Smith, Elizabeth Smith, and Mary Smith, were members of the society in July, 1884. A benefit certificate was issued to each of the firsts, which provided for the payment of a death benefit in the sum of \$100.00 to a designated beneficiary. In addition, the by-laws provide that each member is entitled to wish benefits at the rate of \$0.50 per week for a minimum of ten weeks in each year. At a regular meeting of the society held on July 12, 1884, in a hall located at 12th and May Streets, Chicago, Illinois, the members provided. Forty six members attended. In the course of the meeting, Joseph Smith stated that on Sunday, July 1, 1884, he was fastened and beaten up in Allen Park in the town of ... Brothers John Smith, Stephen Smith and John Smith, ministers ... and that the attack took place at an early hour of a ... It was stated that the three ministers he mentioned ... from the society. Joseph protested that his statement was nothing to do with the society, and declared that saying should not have been at the meeting, and having been invited; that he, Joseph, had not made any declaration regarding the statement; that Joseph was asked to leave; that he did not stay and that a fight ensued. The presiding officer asserted that the society was concerned in the incident as Joseph had to be carried by a physician and the society was required to pay him, Joseph, a sick benefit. A dispute followed in which the friends in the town were thoroughly discussed. When argued that the society had no right to try them. It was then decided to vote by ballot on the proposition as to whether the three ministers,

who were charged with having assaulted Lacina, should be expelled. Twenty eight members voted for expulsion, eight voted against expulsion and ten members refrained from voting. The presiding officer then informed the three plaintiffs that they were expelled from the society. Subsequent to the meeting, the secretary, Vaclav Tucek, sent a written notice to the members, telling them of the expulsion, and informing them that at the regular meeting to be held on August 9, 1934, a discussion would take place concerning the plaintiffs "who were expelled from the society at the last meeting." On August 9, 1934, plaintiffs were present in the hall. The president, however, refused to open the meeting until the plaintiffs left the hall. At his insistence they left. During the meeting Vaclav Tucek moved to have the expulsion reconsidered. After considerable debate, the motion to reconsider was put to a vote. Twenty five members voted against reconsideration and twenty three members voted in favor of reconsideration. Therefore, the motion to reconsider failed. After the vote was announced, Jan Franc, a past president of the society, took the floor and spoke upon the aims and purposes of the society. Plaintiffs contend that in the course of his remarks, Franc stated that the members "will not tolerate any bootleggers, gangsters or murderers to be associated with them in the same society." Plaintiffs also contend that Vaclav Seba arose after Franc had concluded, and that Seba stated, in substance, that Franc was entirely correct and that the lodge members should not associate with such "gangsters and bootleggers."

On December 12, 1934, plaintiffs filed a two count complaint in the Circuit Court of Cook County. The complaint was stricken. On May 25, 1938, plaintiffs filed a two count amended complaint. The first count named Jan Franc, Rudolph Prohaska, Fred Necha, Anton Vloek, Vaclav Tucek and Vaclav Seba as defendants, and charged that on

the vote shared with having, according to the rules, should be rejected.
Twenty eight members voted for resolution, eight voted against
resolution and ten members refrained from voting. The president
thereupon then informed the house of the fact that they were excluded
from the society. Subsequent to the meeting, the secretary, Volney
Jones, sent a written notice to the members, telling them of the
exclusion, and informing them that at the regular meeting to be held
on August 4, 1834, a discussion would take place concerning the
plaintiffs who were expelled from the society at the last meeting.
On August 2, 1834, plaintiffs were present in the hall. The
president, however, refused to open the meeting until the plaintiffs
left the hall. At his instance they left. During the meeting
Volney Jones would be seen for religious conversation. After some
affordable debate, the motion to reconsider was put to a vote. Twenty
five members voted against reconsideration and twenty three members
voted in favor of reconsideration. Therefore, the motion to
reconsider failed. After the vote was announced, Volney Jones, a
president of the society, took the floor and spoke upon the same and
in support of the society. Plaintiffs contended that in the course of
his remarks, Jones stated that the women will not tolerate any
homicides, murders or assassinations to be associated with them in
the same society. Plaintiffs also contended that Volney Jones spoke
after, Jones had concluded, and that had stated, in substance, that
there was entirely correct and that the ladies members should not
associate with such "murderers and assassins."
On December 12, 1834, plaintiffs filed a two count complaint
in the Circuit Court of said County. The complaint was captioned,
"The said Jones, Plaintiff, vs. The said Jones, Defendant." The
first count named the said Volney Jones, the said Jones, John Jones,
Volney Jones and Volney Jones as defendants, and charged that on

August 9, 1934, in a certain discussion of and concerning the plaintiffs, at a meeting of the society in the presence and hearing of divers persons they falsely and maliciously spoke and published of and concerning plaintiffs, false, scandalous, malicious and defamatory words, stating that plaintiffs were "gangsters, hoodlums, bootleggers and murders," meaning thereby that plaintiffs were a low type of people who had violated the law and violated the prohibition laws of the country. In the first count plaintiffs asked damages against the individual defendants in the sum of \$25,000.00. The second count was directed against the society and was bottomed on the expulsion of plaintiffs at the July, 1934, meeting. The count charged that the expulsion was unlawful. It also charged that the action of the society in not allowing the plaintiffs to participate in the meeting of August 9, 1934, was wrongful. Plaintiff John Nuncio asked for a judgment against the society in the sum of \$2,000.00, Steve Nuncio asked for a judgment in the same sum, and John Sabota asked for a judgment in the sum of \$2,000.00. The defendants answered and admitted that the plaintiffs were members of the society, denied that plaintiffs had complied with the rules and by-laws, or that they had always conducted themselves in a manner creditable to the society, denied that they falsely, maliciously or otherwise spoke of or published concerning plaintiffs any false, scandalous, malicious or defamatory words, denied that the expulsion of plaintiffs was unlawful; asserted that the expulsion was proper, and denied that plaintiffs suffered any damages. On October 19, 1938, the defendants Fred Secha, Anton Vlcek and Vaclav Fucsek were dismissed from the cause on action of plaintiffs. The cause was tried before the court without a jury. The court sustained a motion to find the defendant, Rudolph Frohaska, not guilty. The court found the defendants, Jan Franc and Vaclav Seba, guilty of slander and assessed their damages at the sum of

August 6, 1964, in a certain discussion of the movement of the firm-
ally, as a meeting of the society in the presence and hearing of
about twenty they already and willingly spoke and mentioned at
and concerning Alvin, John, Elizabeth, William and Dorothy
and, stating that Alvin was "convinced", William, Elizabeth
and Dorothy, "stating that Alvin was a law type of
people who had violated the law and violated the provisions of the
the country. In the time when Alvin was a law type of people
the individual members in the sum of \$10,000.00. The second
would be directed against the society and the members of the same
aim of Alvin at the July, 1964, meeting. The court charged that
the Alvin was Alvin. It also charged that the action of the
society is not allowing the Alvin to participate in the meeting
of August 6, 1964, was wrongful. Alvin was asked for a
judgment against the society in the sum of \$10,000.00, three times
asked for a judgment in the sum of \$10,000.00, and the court asked for a
judgment in the sum of \$10,000.00. The defendant answered and
admitted that the Alvin was a member of the society, denied that
Alvin was involved with the Alvin and Dorothy, or that they had
Alvin conducted themselves in a manner prohibited to the society.
denied that they Alvin, Elizabeth or Dorothy were at or
admitted concerning Alvin's any John, Elizabeth, William or
definitive order, denied that the members of Alvin's was wrongful,
admitted that the Alvin was proper, and denied that Alvin
violated any law. On October 12, 1964, the defendant filed motion
James filed and filed motion with Alvin from the court on motion
of Alvin. The court was filed before the court Alvin a July.
The court sustained a motion to that the Alvin, William, Elizabeth,
and Dorothy. The court found the defendant, the court was wrong
that Alvin at Alvin and Dorothy were wrong at the sum of

\$200.00 and entered judgment accordingly. The court found the society guilty, as charged in the second count of the amended complaint, and assessed plaintiffs' damages at the sum of \$200.00, and entered judgment against the society for \$200.00. Each judgment was in favor of all the defendants without apportionment. This appeal followed. After the plaintiffs were expelled, Joseph Lacina filed an action for damages in the Superior Court of Cook County, being case No. 34 & 13763. The action was based on the assault, which he asserted was made on him by the plaintiffs. That is the same assault which was the basis for the expulsion of the three plaintiffs. The action in the Superior Court resulted in a verdict and judgment in favor of Joseph Lacina and against the three plaintiffs herein for \$1,800.00. The defendants therein, who are plaintiffs here, appealed to this court, and in an opinion filed in case No. 23829 the judgment was affirmed. The defendants therein asked the Supreme Court of Illinois for leave to appeal. The request was not granted.

We shall first consider the finding and judgment of the court entered on the first count of the amended complaint. That is the count which charges the individual defendants with slander. The first criticism leveled at the judgment is that the findings are against the manifest weight of the evidence. The alleged defamatory language was uttered at the August, 1934, meeting. The answer of the defendants denied that such language was used. The answer of the defendant made an issue only of the proposition as to whether the alleged defamatory language had been used and whether plaintiffs were damaged by such language. A perusal of the transcript of the testimony establishes that there was competent evidence that the language was used. The testimony is conflicting. In that situation,

this court will not interfere with the findings of the court on questions of fact unless they are against the manifest weight of the evidence. After a careful examination of the record, we are satisfied that the findings of the court are not against the manifest weight of the evidence.

Defendants also insist that the alleged defamatory remarks were privileged, and point out that the defendants were active members of the society with the privilege of taking the floor to speak on various matters that arose, and that defendants had an interest in the subject matter under discussion, namely, the expulsion of allegedly undesirable members. They also call our attention to the fact that the people to whom the remarks were communicated, were also members of the society possessed of a corresponding interest in the subject matter under discussion. They cite the case of Everett v. Selong, 144 Ill. App. 496, 500, as authority for the statement that "where words imputing misconduct to another are spoken by one having a duty to perform, and the words are spoken in good faith, and in the belief that it comes within the discharge of that duty, or where they are spoken in good faith, to those who have an interest in the communication, and a right to know and act upon the facts stated, no presumption of malice arises from the speaking of the words; and therefore no action can be maintained in such cases, without proof of express malice." Defendants also urge that before the words complained of can be considered slanderous, they must be carefully construed in connection with the entire context of the speeches. Defendants assert that it was erroneous to hold that the use of the words constituted slander per se. They state that in the absence of proof of any damages whatsoever resulting from the use of the words, and in the further absence of any proof of malice on the part of defendants, the action of the court in rendering judgment upon the first count was erroneous.

Plaintiffs do not challenge the points of law argued by defendants. They do, however, say that the burden was upon the defendants to show that the occasion of the speaking of the slanderous words was privileged, and that the words were spoken from a sense of duty in order to entitle defendants to the protection that attaches to the defense of privilege. Defendants argue that a consideration of the entire speeches and of the circumstances under which they were delivered, shows that they were not alluding to the plaintiffs when they spoke about bootleggers, gangsters and murderers. There was a sharp conflict in the evidence. The Court saw and heard the witnesses, and had an opportunity to observe their demeanor, and necessarily determined that the alleged defamatory words alluded to the plaintiffs. The trial judge also necessarily decided that the defendants did not establish that they were acting within the protection of any privilege at the time the words were uttered. Plaintiffs point out that the alleged defamatory words were uttered after the vote on the motion to reconsider had been announced. We cannot find that the court was in error in deciding that, under the circumstances, the words constituted slander per se. The damages allowed under the first count are not excessive or unreasonable.

We will now consider the second count, under which a judgment was entered against the society for \$200.00. Under the by-laws, a member could be expelled if he acted immorally, or if he abused a member. Plaintiffs did not contend that they were not guilty of assaulting Joseph Lacina. At the July, 1934, meeting it was proposed to pay Lacina sick benefits because of the injuries that he suffered from the assault. Plaintiffs argue that the society had no concern with what transpired at the outing. We are unable to agree with that contention. One of the purposes of a society, such as the one to which the parties belonged, is to promote fellowship and brotherly

love. Clearly, the society had the right to expel the plaintiffs if they found them guilty of acting immorally or abusing a member. Paragraph 7 of Article 10 of the by-laws provides for the election of a committee of three, which would have the power to investigate the offense charged and to report its findings at the following meeting. No committee was appointed. However, the matter was fully aired at the July, 1934, meeting, and all interested parties were present and had an opportunity to be heard. As we have pointed out, plaintiffs did not deny that they assaulted the member. That this court is interested in knowing is whether substantial justice has been accomplished. The matter was considered at the July meeting and again at the August meeting. Subsequently, a judgment was rendered against the plaintiffs in the sum of \$1,500.00. The judgment was based on the assault because of which the plaintiffs were expelled. While the members could not know at the time the July and August meetings were held, that Lacina would prevail in an action for damages against plaintiffs, nevertheless, the fact that he did successfully prosecute such a suit, gives strong support to the action of the society in expelling the plaintiffs. We find that while the society, in expelling the three members, did not follow the letter of the by-laws, it did so in substance. We are of the opinion that the record does not establish that the society acted wrongfully in expelling the plaintiffs. Entertaining these views, we deem it unnecessary to comment on the other rulings of the trial court with respect to the judgment on the second count.

Defendants also urge that the court erred in entering joint judgments where the damages were several in character. We agree that the court should have set out in the findings and in the judgments the amount awarded to each plaintiff. However, the damages are not excessive, and the defendants are not harmed by the failure of the

W

have, thereby, the society had the right to accept the claimants
it may have been guilty of some kind of wronging a woman.
Paragraph 7 of Article 10 of the Kansas constitution for the election
of a committee of three, which would have the power to investigate
the claims charged and to report the findings of the following
meeting. No committee was appointed. However, the action was only
taken at the July, 1904, meeting, and all interested parties were
present and had an opportunity to be heard. It is not to be
claimed that they presented the evidence. That this
court is interested in knowing is whether substantial justice has
been accomplished. The action was considered at the July meeting
and again at the August meeting. Subsequently, a judgment was
rendered against the claimants in the sum of \$1,000.00. The judgment
was based on the records of which the claimants were excluded.
While the records would not show at the time the July and August
meetings were held, the claimants would have been in an action for damages
against claimants, nevertheless, the fact that no claimants
proceeded with a suit, gives strong support to the action of the
society in excluding the claimants. It is not to be said that the society
is excluded the same society, but that claimants are taken of the
fact, it is not in substance, we are of the opinion that the records
does not establish that the society acted wrongfully in excluding the
claimants. Referring these facts, we deem it unnecessary to
comment on the effect of the trial court with respect to the
judgment on the second count.
Reference also made to the court's error in excluding claimants
judgments where the damages were several in character. It is
that the court should have set out in the findings and in the judgment
the amount sought to be paid claimants. However, the damages are not
ascertained, and the determination has not been made by the trial court.

court to apportion the judgment.

For the reasons stated, the judgment on the first count for the plaintiffs and against defendants, Jan Franc and Vaclav Seba, is affirmed, and the judgment on the second count in favor of plaintiffs and against Vzdslavaci & Podporujici Spolek "Ilova", is reversed.

JUDGMENT AGAINST JAN FRANO AND VACLAV
SEBA AFFIRMED; JUDGMENT AGAINST
VZDMLAVACI A PODPORUJICI SPOLEK "ILOVA"
REVERSED.

DENIS E. SULLIVAN, F.J. AND HEBEL, J. CONCUR.

...the ... of ...

...the ... of ...

...the ... of ...

...the ... of ...

...the ... of ...

...the ... of ...

...the ... of ...

...the ... of ...

40783

WILL H. WAKE,

Appellant,

v.

DAYTON KEITH, et al.,

Appellees.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

302 I.A. 570

MR. JUSTICE BURKE DELIVERED THE OPINION OF THE COURT.

On January 4, 1939, plaintiff filed his two count amended statement of claim in the Municipal Court of Chicago, and therein sought to recover a brokerage commission for procuring a loan for the defendants. The first count avers that on May 23, 1935, the defendants entered into a written agreement with plaintiff; that in pursuance of the agreement he expended a large amount of time in negotiating, for the purpose of procuring a loan for defendants in the sum of \$75,000.00; that he did procure the loan for that amount upon the specific terms and conditions called for by the agreement; that he secured and delivered to defendants the written commitment of Investors Syndicate to make the loan; that the syndicate was then fully capable of and intended to carry out the commitment; that on June 21, 1935, the defendants agreed with plaintiff to accept the loan so made and to notify plaintiff and the lender when they (defendants) would be ready to execute the necessary documents and to receive the funds from the loan; that although frequently requested by plaintiff to execute the necessary documents and to receive the funds from the loan in manner and form as provided in the agreement, the defendants wholly failed and refused so to do, and that thereby the defendants became indebted to him in the sum of \$1,220.00, plus interest at the rate of 5% per annum since July 21, 1935. The written agreement is set out in hacq verba. Plaintiff sued Dayton Keith, Frederick C. Curry, Walter J. Sugden, Charles S. Tuttle and Charles A. Weston, "not

NOTE

FILE NO. 1002

V.

DAVID KIRK, JR.

Plaintiff

Defendant

FILE NO.

BY COURT

3021A.570

IN RE: DAVID KIRK, JR. AND THE ESTATE OF THE SAME

On January 4, 1932, Plaintiff filed his second amended statement of claim in the Municipal Court of Chicago, and therein sought to recover a brokerage commission for procuring a loan for the defendant. The first count averred that on May 22, 1932, the defendant entered into a written agreement with Plaintiff; that in pursuance of the agreement he expended a large amount of time in negotiating for the purpose of procuring a loan for the defendant in the sum of \$75,000.00; that he did procure the loan for that amount upon the specific terms and conditions called for by the agreement; that he secured and delivered to the defendant the written consent of Investors Syndicate to make the loan; that the syndicate was then fully capable of and intended to carry out the agreement; that on June 11, 1932, the defendant agreed with Plaintiff to accept the loan as made and to satisfy Plaintiff and the lender when they (Plaintiff) would be ready to receive the necessary documents and to receive the funds from the lender; that Plaintiff promptly requested by Plaintiff to execute the necessary documents and to receive the funds from the lender in money and form as provided in the agreement, the defendant wholly failed and refused so to do, and that thereby the defendant became indebted to him in the sum of \$7,240.00, the interest at the rate of 10 per annum since July 22, 1932. The written agreement is set out in Exhibit A. Plaintiff and David Kirk, Defendant's Son, have signed a document, Exhibit B, dated and captioned as follows, "That

individually but as the Committee for the protection of the holders of first mortgage bonds sold through the American Bond and Mortgage Company". This agreement was between the plaintiff and the committee as such. A clause therein provided that "nothing herein contained shall be construed to impose any individual or personal liability on the members of the Committee, it being expressly agreed that the members of the Committee execute this application, not individually, but as members of said Committee, pursuant to and in accordance with the powers granted to the Committee by the terms of a deposit agreement dated October 24, 1929, as amended, all liability being expressly limited to the deposited bonds issued under the trust deed being foreclosed in the cause entitled Chicago Title and Trust Company vs. Churchill Hotel Company, Circuit Court No. B-193937."

The second count averred that on May 21, 1935, the defendants employed him to negotiate for them a loan in the sum of \$75,000.00 under the terms and conditions stated in the agreement set out in the first count; that he did, by devoting a great amount of time and effort, succeed in procuring a loan from the Investors Syndicate; that he procured from the syndicate a commitment that it had reserved and set aside the funds necessary for the purpose of making the loan, when defendants should deliver to the syndicate the notes, trust deeds and other documents specified in the agreement; that the defendants agreed to accept the loan so reserved and to execute the trust deeds, notes and other necessary documents within 30 days, and agreed to pay him for his services in procuring the loan, the sum of \$2,250.00; that although the 30 days had elapsed, the defendants had not presented to the lender the trust deeds, notes and other necessary documents for the purpose of securing the loan, and had not withdrawn the funds of said loan out of the commitment so made by the lender, but had abandoned the making of the loan; that having

individually but as the Committee for the Revision of the Statute
at that time, which was the revision of the Statute and the
Committee. This agreement was between the Committee and the
Committee as well. A clause therein provided that "nothing herein
contained shall be construed to impose any liability on persons
liability on the members of the Committee. It merely expressly states
that the members of the Committee receive their compensation, not
individually, but as members of said Committee, pursuant to and in
accordance with the power granted to the Committee by the House
of a Special Agreement dated October 24, 1924, as amended, all
liability being expressly limited to the persons named therein
under the terms and conditions in the same entitled "Hague
Hague and the Committee of the Hague, which is the
Hague."

The second count averred that on May 27, 1924, the defendant
employed him to negotiate for them a loan in the sum of \$25,000.00
under the terms and conditions stated in the agreement and that in
the first count; that he did, by drawing a great amount of time
and effort, succeed in procuring a loan from the International
Bank for Reconstruction and Development, which it had received
and set aside the funds necessary for the purpose of making the loan,
and defendant should deliver to the plaintiff the notes, bonds
and other documents specified in the agreement; that the
defendant agreed to supply the loan as averted and to execute the
notes, bonds, and other necessary documents within 30 days, and
agreed to pay him for his services in procuring the loan, the sum
of \$2,500.00; that although the 30 days had elapsed, the defendant
had not presented to the plaintiff the notes, bonds and other
necessary documents for the purpose of securing the loan, and had
not delivered the funds of said loan out of the commitment as made
by the plaintiff, but had obtained the money at the loan, that having

so abandoned the making of the loan, the defendants promised plaintiff "when they should thereunto afterwards be requested" to pay him the \$2,250.00 for his services; that he requested payment on July 21, 1935, which defendants refused to make; that because of such failure he claimed damages in the sum of \$2,250.00, and interest at 5% per annum since July 21, 1935. On January 11, 1939, defendants, by their attorneys, served notice on plaintiff that they would appear in court on the following day and move to strike the amended statement of claim for the reason "among others, that the same fails to set forth any cause of action in the plaintiff and that the instrument sued on shows on its face that no such cause of action exists." On January 12, 1939, the court sustained defendants' motion. On February 7, 1939, plaintiff presented a written motion and therein sought to vacate the order striking the amended statement of claim and to enter judgment thereon against defendants in the sum of \$2,250.00, plus interest from July 21, 1935. On the same day the court overruled the motion to vacate and the motion for a judgment against the defendants. Thereupon, the plaintiff elected to stand by his amended statement of claim and the court dismissed the suit and entered judgment against the plaintiff for costs. This appeal is prosecuted to review the action of the trial court.

The parties agree that a motion to dismiss or to strike admits the truth of the facts that are well pleaded. There is no challenge to the plaintiff's assertion that a general motion to strike will not justify the dismissal of a complaint containing one good count. In the instant case, the defendants served notice that they would appear and argue that the amended statement of claim should be stricken because it did not state a cause of action. They did not file a written motion. Their oral argument in support of their oral motion was the equivalent of the old general demurrer. The better practice

...the matter of the loan, the defendant requested relief
...that they should be relieved of the burden of the loan
...him and the defendant; that he requested payment on
...July 21, 1933, which defendant refused to make; that because of
...such failure he claimed damages in the sum of \$5,000.00, and interest
...of 6% per annum since July 21, 1933. On January 11, 1934, defendant
...to this court, and the court in its order stated that the plaintiff
...in court on the following day and move to strike the amended state-
...ment of claim for the reason "among others, that the same fails to
...set forth any cause of action in the plaintiff and that the imple-
...ment sued on states an act done that no such cause of action exists."
...On January 11, 1934, the court sustained defendant's motion. On
...February 7, 1934, plaintiff presented a written motion and therein
...sought to vacate the order striking the amended statement of claim
...and to enter judgment against defendant in the sum of
...\$5,000.00, plus interest from July 21, 1933. On the same day the
...court overruled the motion to vacate and the motion for a judgment
...against the defendant. Thereupon, the plaintiff elected to stand
...by his amended statement of claim and the court dismissed the case
...and entered judgment against the plaintiff for costs. This appeal
...is presented to review the action of the trial court.
...The parties agree that a motion to dismiss or to strike admits
...the truth of the facts that are well pleaded. There is no challenge
...to the plaintiff's contention that a general motion to strike will
...not justify the dismissal of a complaint containing one good count.
...In the instant case, the defendant moved to strike the plaintiff's
...statement and argue that the amended statement of claim should be dismissed
...because it did not state a cause of action. They did not file a
...written motion. They only argued in support of their oral motion
...and the court in its oral decision. The court's decision

is to file a written motion. However, the defendants did not complain of the informality and cannot be heard to complain at this time. We will treat the oral motion to dismiss as the equivalent of a general demurrer under the old practice.

Defendants assail the amended statement of claim because of a clause in the agreement which reads, "It is further expressly understood and agreed that no fees or expenses shall be incurred by the undersigned in connection with this application unless and until said loan is actually consummated." Defendants further allude to the fact that the agreement recites that "the purpose of this loan is to provide funds necessary to effect a reorganization of this property. It is contemplated that said reorganization will be consummated under supervision of the court in which said foreclosure proceeding is pending." The loan agreement also contemplated the formation of a corporation which would execute the necessary documents. Plaintiff does not allege that the loan was consummated. In fact, he avers that the making of the loan was abandoned. Nor does plaintiff aver that the court approved the loan, or that the contemplated corporation was organized.

Plaintiff maintains that his pleading alleges sufficient ultimate facts to show a liability on the part of the defendants. He insists that the pleading shows (1) that defendants hired the plaintiff for a specific employment; (2) that plaintiff performed the job; (3) that defendants promised to pay plaintiff a fixed fee for his services, and (4) that defendants refused to pay. He calls attention to the language of Section 35 of the Civil Practice Act, that all pleadings shall contain a plain and concise statement of the pleader's cause of action. We understand that the pleadings in the Municipal Court of Chicago are governed by the provisions of the Municipal Court Act, and by the rules adopted pursuant thereto.

is as this a written notice. However, the defendant did not deny
that of the defendant and cannot be denied in connection with this
time. He will press the case in relation to the defendant
of a general summary under the old statute.
Defendant recalls the amount of this payment of
a claim in the agreement which says, "It is further expressly
understood and agreed that no loss or expense shall be incurred
by the defendant in connection with this litigation unless and
until such loss is actually sustained." Defendant further states
in the fact that the agreement recites that the purpose of this
loan is to provide funds necessary to effect a reorganization of
this property. It is acknowledged that such reorganization will be
conducted under supervision of the court in which said corporation
proceeding is pending. The loan agreement also mentioned the
formation of a corporation which would receive the property
concerned. Plaintiff does not allege that the loan was consummated.
In fact, he shows that the making of the loan was prevented. He
also pleads that the loan was never repaid the loan, at that the
contracted corporation was organized.
Plaintiff wishes that the learned referee explain
certain facts to him - including in the fact of the defendant,
to include that the learned referee (a) that defendant never the
defendant for a specific assignment; (b) that plaintiff borrowed
the fact that the defendant wanted to pay plaintiff a loan for
for his services; and (c) that defendant refused to pay. He will
attention to the language of Section 32 of the Civil Practice Act, that
all pleadings shall contain a plain and concise statement of the
material facts of the case. He submitted that the pleading in the
defendant's case of failure. He submitted that the provisions of the
defendant's case of failure are governed by the provisions of the
defendant's case of failure, and by the rules adopted between parties.

However, Section 31 of the Civil Practice Act provides that "this section shall not be deemed to affect in any way the substantial averments of fact necessary to state any cause of action either in law or in equity." We conclude that it is still necessary to set out such substantial averments as shall state a cause of action. The word "consummated" has been defined as meaning "to bring to completion, or perfection; to achieve; of the highest degree; perfection; complete."

In the case of Matteson v. Walker, 249 Ill. App. 404, plaintiff sued defendant for a broker's commission on a written agreement to pay plaintiff a "3% commission * * * if the sale is actually consummated, but not otherwise." Plaintiff's statement of claim was stricken and judgment entered for the defendant, the Appellate Court affirming the judgment. The court said:

"Under the Bentley letter the commission was only payable upon the consummation of a sale, and while it may seem arbitrary for defendant to refuse to carry out the sale negotiated by plaintiff, yet the parties must be bound by their contract and the right to recover such commission is not confined to the negotiation of the sale, but there must be something more than that under the terms of the contract. There must be an actual consummation thereof, and there was no consummation of the sale. The provision is explicit that 'if the deal falls through and the sale is not made whatever the reason may be, Mr. Walker will pay no commission.' It is not disputed that the sale alleged to have been negotiated by plaintiff was not consummated, and that it did fall through by reason of defendant's refusal to sign the contract of purchase procured by plaintiff and signed by German.

Plaintiff made the contract of his own volition, free and untrammelled, with defendant, and by its terms both parties thereto are bound. There is no ambiguity in the language used to express the intention of the parties, and therefore there is nothing left for construction. It may be an unfortunate contract for plaintiff, but nevertheless, it is binding. Even a court of equity would not, if applied to, make a new contract for the parties in the absence of a charge of fraud, as held in Higler v. Illinois Trust & Savings Bank, 245 Ill. 180. Courts will enforce contracts according to their terms. No rights can be adjudicated which are not covered by the express terms of the contract. Plaintiff well knew that the contract provided that before commissions were payable the sale should be actually consummated, and that if it was not actually consummated no commissions were payable. Under the contract defendant was given the right for any reason to refuse to carry out its terms. As no sale was made binding on defendant, he is not liable to pay the commission demanded by plaintiff."

In the case of Russek v. Maynard, 183 Ill. App. 478, (abstract opinion) the plaintiff sued upon a contract with the defendant and one Restik that "each one is to pay the above commission to Joseph Russek when the deal is consummated." The deal was not completed for want of a merchantable title. The court said:

"It appears from the evidence that plaintiff himself drafted the contract; that it was therein provided that plaintiff should be paid a stipulated sum by defendant as commissions, 'when the deal is consummated', and that for the reasons disclosed by the evidence the 'deal' was not consummated. 'Where the contract is such that the right of the broker to compensation is made dependent upon the actual consummation of a sale or the payment of the entire purchase money, a fulfillment of those conditions is, of course, a prerequisite to his right to recover compensation. (23 Ency. Law 2nd Ed. p. 918; Wheeler on Agency, Sec. 965; Ballard v. Shea, 123 Ill. App. 135, 139.)"

In view of the failure of plaintiff to allege that the loan was consummated, we are of the opinion that the first count of the amended statement of claim is vulnerable to the motion directed against it.

Plaintiff states that the second count of his amended statement of claim is based on an oral agreement. However, he avers that on May 23, 1935, the defendants engaged him to negotiate a loan under the terms and conditions stated in the agreement set out in the first count. His employment on May 23, 1935, therefore, was under the agreement set out in the first count, which agreement contained the clause we have quoted. The second count, however, alleges that the defendants had abandoned the making of the loan, and "having so abandoned the making of said loan, promised plaintiff when they should thereunto afterwards be requested, to pay him said \$3,250.00 for his services aforesaid." Although the pleading does not so state, we conclude that the promise, after the abandonment of the making of the loan, was an oral one. Defendants assail the second count by asserting that there was no consideration for the alleged oral promise of the defendants. From a perusal of the second count, we conclude that if there was consideration for the oral promise, such consider-

ation consisted of the services rendered previous to the making of the oral promise. As we have seen, the services so rendered were made on the basis that if the loan was consummated the plaintiff would be entitled to a commission. To use the language of the plaintiff, the making of the loan was abandoned by defendants. Therefore, there was no obligation, moral or legal, on the part of defendants to pay the plaintiff for his services under the contract, or on the basis of a quantum meruit. The question then arises as to whether a promise to pay for services for which the defendants were not liable, constitutes a valid consideration. By the oral promise the defendants agreed to pay for services for which they were not otherwise liable.

In support of his contention that the consideration was adequate, plaintiff refers us to the case of Winefield v. Feder, 169 Ill. App. 480. The situation there was that the plaintiff, a real estate broker, was employed by the defendant to procure a purchaser for the latter's property. Plaintiff succeeded in procuring a purchaser, who arrived at an agreement with defendants as to the price and terms of purchase. The defendant then notified plaintiff by telephone that he was closing the deal, but that plaintiff would have to be satisfied with a \$500.00 commission. Plaintiff at first objected, contending that his commission should be \$1,000.00. He finally agreed to take \$500.00. The court held that the facts clearly established an agreement to pay \$500.00. It was contended that a past act could not serve as consideration for a promise. The court found that the consideration was sufficient. That case, however, is not applicable to the situation before us. Clearly, in the Winefield case there was a valid consideration. The agreement was that the plaintiff would procure a purchaser for

which consisted of the services rendered by the plaintiff to the defendant in the making of the said contract. As we have seen, the services so rendered were made on the basis that if the defendant was dissatisfied with the plaintiff's work, the defendant would be entitled to a refund. It was the intention of the plaintiff, the making of the loan was evidenced by testimony. There, there was no obligation, until the day of the plaintiff's payment to pay the plaintiff for his services under the contract, as in the case of a quantum meruit. The question then arises as to whether a promise to pay for services for which the defendant was not liable, constitutes a valid consideration. By the way, the promise and defendant agreed to pay for services for which they were not otherwise liable.

In the case of the defendant and the plaintiff, the plaintiff seeks to be the case of the plaintiff v. the defendant. The situation there was that the plaintiff, a real estate broker, was employed by the defendant to purchase for the latter's property. Plaintiff commenced in purchasing a property, who served as an agent with defendant on the time and terms of purchase. The defendant then notified plaintiff by telephone that he was closing the deal, but that plaintiff would have to be satisfied with a \$500.00 consideration. Plaintiff at that moment, contending that his consideration should be \$1,000.00. He finally agreed to take \$500.00. The court held that the consideration was not a gift, but was a consideration for a promise. The court found that the consideration was not a gift, but was a consideration for a promise. It was, however, in the situation before us. Plaintiff, in the present case, seeks a valid consideration. The argument was that the plaintiff would procure a purchase for

the property. He did so, and claimed that he was entitled to a commission of \$1,000.00. The defendant did not want to pay \$1,000.00. The parties finally agreed that a commission of \$500.00 would be acceptable. In that case, the court cited the case of Carson v. Clark, 2 Ill. 113. In the instant case, the Carson case is also relied upon. We are of the opinion that the Carson case does not support plaintiff's argument.

We are satisfied that the court was right in striking the amended statement of claim and in entering judgment for costs against plaintiff. Therefore, the judgment of the Municipal Court of Chicago is affirmed.

JUDGMENT AFFIRMED.

DENIS E. SULLIVAN, P.J. AND HEBEL, J. CONCUR.

the property. He did not, and claimed that he was entitled to a
remission of \$1,000.00. The defendant did not want to pay \$1,000.00.
The parties finally agreed that a remission of \$500.00 would be
acceptable. In that case, the court cited the case of WILSON V.
WILSON, 2 Ill. 112. In the instant case, the WILSON CASE is also
cited upon. As one of the parties that the WILSON CASE does not
control. WILSON'S decision is reversed.

It was held that the court was right in reversing the
reversed statement of claim and in entering judgment for costs.
Reversed. Therefore, the judgment of the Municipal Court
of Chicago is affirmed.

WILSON'S DECISION

WILSON V. WILSON, 2 Ill. 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

40777

BOOTH KELLY LUMBER COMPANY, a
corporation,

Appellant,

v.

JOHN RUEL and CAROLINE RUEL LAWRENCE,
formerly trading as RUEL LUMBER COMPANY,

Appellees.

Consolidated with

W. C. VOSEMYER, trading as Western
Sales Agency,

Appellant,

v.

JOHN G. RUEL and CAROLINE M. RUEL,

Appellees.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

302 I.A. 588

MR. JUSTICE BURKE DELIVERED THE OPINION OF THE COURT.

Plaintiffs appeal from an order vacating judgments against the defendants, pursuant to the prayer of a petition filed in the trial court under Section 21 of the Municipal Court Act, (Section 378, Chapter 37, Ill. Rev. Stat. 1939.) Two separate actions, later consolidated, had been filed against the same two defendants. Both cases, one for \$218.82 and the other for \$771.71, were for the selling price of lumber sold and delivered to defendants, (it was alleged), trading as Ruel Lumber Company. They were tried concurrently by the court without a jury, and judgments were entered on November 10, 1938, in favor of plaintiff and against both defendants in each case for the full amount claimed. The defendant, Caroline Ruel Lawrence, also called Caroline M. Ruel, on November 18, 1938, made a motion to vacate the judgments against her, which was overruled on November 18, 1938. Thereafter, on December 7, 1938, a motion to vacate the judgments of November 18, 1938, and for a new trial, was filed by the same defendant and postponed to December 22, 1938. This was never disposed of. The basis of the motion was

UNITED STATES DEPARTMENT OF JUSTICE
WASHINGTON, D. C.

CONFIDENTIAL

1

THIS CASE AND ALL OTHER CASES
HEREIN ARE CLASSIFIED AS "CONFIDENTIAL"

CONFIDENTIAL

CONFIDENTIAL

UNITED STATES DEPARTMENT OF JUSTICE
WASHINGTON, D. C.

CONFIDENTIAL

2

UNITED STATES DEPARTMENT OF JUSTICE
WASHINGTON, D. C.

CONFIDENTIAL

3021A.588

UNITED STATES DEPARTMENT OF JUSTICE
WASHINGTON, D. C.

UNITED STATES DEPARTMENT OF JUSTICE
WASHINGTON, D. C.

UNITED STATES DEPARTMENT OF JUSTICE
WASHINGTON, D. C.

UNITED STATES DEPARTMENT OF JUSTICE
WASHINGTON, D. C.

UNITED STATES DEPARTMENT OF JUSTICE
WASHINGTON, D. C.

UNITED STATES DEPARTMENT OF JUSTICE
WASHINGTON, D. C.

UNITED STATES DEPARTMENT OF JUSTICE
WASHINGTON, D. C.

UNITED STATES DEPARTMENT OF JUSTICE
WASHINGTON, D. C.

UNITED STATES DEPARTMENT OF JUSTICE
WASHINGTON, D. C.

UNITED STATES DEPARTMENT OF JUSTICE
WASHINGTON, D. C.

UNITED STATES DEPARTMENT OF JUSTICE
WASHINGTON, D. C.

UNITED STATES DEPARTMENT OF JUSTICE
WASHINGTON, D. C.

UNITED STATES DEPARTMENT OF JUSTICE
WASHINGTON, D. C.

UNITED STATES DEPARTMENT OF JUSTICE
WASHINGTON, D. C.

UNITED STATES DEPARTMENT OF JUSTICE
WASHINGTON, D. C.

UNITED STATES DEPARTMENT OF JUSTICE
WASHINGTON, D. C.

UNITED STATES DEPARTMENT OF JUSTICE
WASHINGTON, D. C.

UNITED STATES DEPARTMENT OF JUSTICE
WASHINGTON, D. C.

UNITED STATES DEPARTMENT OF JUSTICE
WASHINGTON, D. C.

UNITED STATES DEPARTMENT OF JUSTICE
WASHINGTON, D. C.

2

asserted to be that the judgments were contrary to the law and evidence. On January 8, 1938, defendant sought and obtained leave to file a petition under Section 21 of the Municipal Court Act, and a rule was entered against plaintiffs to plead, answer or demur within ten days. The petition alleges that on September 23, 1938, the cases were tried before Judge Casey, that no evidence was introduced by plaintiff concerning petitioner, with the exception that for a short period after the death of her husband she was paid \$30.00 per week by Buell Lumber Company; that plaintiff's attorney admitted that he had a weak case against petitioner and that the Judge remarked that he could see no basis for holding petitioner liable. The petition further alleges that the cases were continued to November 10, 1938, and plaintiff and defendant John Buell were ordered to file briefs; that counsel for petitioner endeavored to obtain an order finding in favor of petitioner on the basis of want of evidence to hold her liable, and that the judge stated it would not be necessary for him to file a brief and that a "not guilty" finding would be entered on November 10, 1938; that on November 10, 1938, a judgment was entered against petitioner without any further evidence having been introduced; that petitioner was not represented in court that day because her counsel had been "lulled into security" by the court's attitude on September 23, 1938; that plaintiff's attorney advised him of the entry of the judgment on the afternoon of November 10, 1938, and agreed to appear in court without notice if petitioner's counsel wanted to make a motion to set aside the judgment. The petition next alleges that petitioner served notice of her intention to have the judgment set aside and appeared before Judge Casey on November 15, 1938, where petitioner's counsel remonstrated with Judge Casey for having entered the judgments; that the judge agreed that his attitude had been as above outlined, but that he had changed his mind on November 10, 1938, and had therefore

...to be that the judgments were contrary to the law and
evidence. On January 11, 1937, defendant sought and obtained leave
to file a petition under Section 11 of the Kentucky Statutes
and a rule was entered against plaintiff to show cause on January
within ten days. The petition alleges that on September 10, 1936,
the same were filed before Judge Lewis, that on evidence was
introduced by plaintiff concerning defendant, with the intention
that for a short period after the death of her husband she was with
him and was by her husband's attorney; that plaintiff's attorney
admitted that he had a week once against defendant and that the
Judge remarked that he would see no basis for holding defendant
liable. The petition further alleges that the same were continued
to November 10, 1936, and plaintiff and defendant then were
ordered to file briefs; that counsel for defendant answered as
shown an order finding in favor of defendant on the basis of want
of evidence to hold her liable, and that the Judge stated it would
not be necessary for him to file a brief and that it was "quit
finding" would be entered on November 10, 1936; that on November 10,
1936, a judgment was entered against plaintiff without any further
evidence having been introduced; that defendant was not represented
in court that day because her counsel had been "injured into poverty"
by the court's action on November 10, 1936; that defendant's
attorney advised her of the entry of the judgment on the afternoon
of November 10, 1936, and asked to appear in court without notice
if defendant's counsel wanted to make a motion to set aside the
judgment. The petition next alleges that defendant served notice
of her intention to have the judgment set aside and requested before
Judge Lewis on November 11, 1936, that defendant's counsel
be represented and that Judge Lewis having entered the judgment; that
the Judge agreed that his attitude had been as above outlined, but
that he had changed his mind on November 10, 1936, and had therefore

entered the judgments; that Judge Casey set these matters for trial on November 18, 1938, and indicated that the hearing would be considered exactly as though the cases had not therefore been heard; and that petitioner raised the question at that time about not wishing to be considered as having made a motion for a new trial. The petition then asserts that on November 18, 1938, Judge Casey announced that that day would be his last day in court; that petitioner is informed that Judge Casey did not sit as a judge subsequent to November 18, 1938, and that his term expired on December 1, 1938; that within 30 days after November 10, 1938, petitioner filed her petition for a new trial, which in the absence of Judge Casey was referred by Judge Brande to the Chief Justice; that petitioner believes that the facts above set forth, coupled with the attitude of the court, are sufficient to warrant a new trial so that she may be fairly heard and have an adequate opportunity of presenting her defense, which petitioner believes, if fairly heard to warrant a judgment of not guilty. Petitioner prayed that the court enter an order setting the causes for trial, at which time petitioner and plaintiffs would have an opportunity to be fully heard respecting the merits. Plaintiffs challenged the legal sufficiency of the petition by a motion to strike, assigning the following reasons: (1) The court did not have jurisdiction to vacate the judgment upon petition because a motion to vacate the judgment had been entered within 30 days and denied by the trial judge; (2) Section 21 of the Municipal Court Act provides that judgments may be vacated under certain circumstances, but does not afford a means of obtaining a new trial, which is the prayer of the petition; (3) the petition does not show grounds for intervention of equity, but only alleges an error of law in Judge Casey's decision; (4) that the petition does not show a good defense, and (5) that the difficulty

entirely the subject; that is, they are not subject to the
of November 15, 1911, and therefore that the meeting would be
concluded exactly as through the case and not otherwise than by;
and that therefore the question of this time shall not
being to be considered as having made a motion for a new trial.
The motion then comes on for November 15, 1911, being the
announced that they will be the first up in court; that
petition is returned that being the first up in court
opportunity to November 15, 1911, and that the first witness in November
1, 1911; and again in the first November 15, 1911, testimony
filed her petition for a new trial, which in the absence of being
they are referred by Judge Evans to the first instance; that
petition believes that the facts show that they, coupled with
the attitude of the court, are sufficient to warrant a new trial of
that she may be fairly heard and have an adequate opportunity of
presenting her defense, which petition believes, it fairly heard
to warrant a judgment of not guilty. Petitioner urges that she
court enter an order setting the same for trial, at which time
petition and plaintiff would have an opportunity to be fairly
heard regarding the matter. Plaintiff challenged the legal
validity of the motion by a motion to set aside, assigning the
following reasons: (1) The court did not have jurisdiction to vacate
the judgment upon petition because a motion to vacate the judgment
had been entered within 30 days and denied by the trial judge; (2)
Section 11 of the Criminal Code set aside that judgment was
to vacate under certain circumstances, but does not allow a motion
of obtaining a new trial, which is the subject of the petition; (3)
The petition does not show grounds for the restoration of equity, but
only alleges an error of law in Judge Evans's decision; (4) That
the petition does not show a good defense, and (5) that the affidavit

complained of arising out of the failure of petitioner's attorney to appear in court on the day to which the case was continued, of which he was advised, and is the result of his neglect. The motion to strike was overruled on February 14, 1933, and plaintiffs elected to stand on the motion. The order reads: "Prayer of petition sustained and judgment of November 10, 1932, vacated and set aside. Case set for trial." It is from that order that plaintiffs prosecute this appeal.

The first criticism leveled at the order appealed from is that the trial court did not have jurisdiction to vacate the judgments by petition under Section 21 of the Municipal Court Act after the trial judge had overruled the motion to vacate the findings and judgments. The defendant replies by saying that "the Municipal Court of Chicago has jurisdiction under Section 21 of the Municipal Court Act to set aside a judgment, provided a proper petition was filed showing grounds sufficient to vacate or modify the judgment by a bill in equity." Section 21 of the Municipal Court Act, (Section 376, chapter 37, Ill. Rev. Stat. 1933) reads: "If no motion to vacate, set aside or modify any such judgment, order or decree shall be entered within thirty days after the entry of such judgment, order or decree, the same shall not be vacated, set aside or modified, excepting * * * by a petition to said Municipal Court setting forth grounds for vacating, setting aside or modifying the same, which would be sufficient to cause the same to be vacated, set aside or modified by a bill in equity." It will be noted that Section 21 provides that if no motion to vacate shall be entered within thirty days after the entry of the judgment, then the same shall not be vacated except by petition setting up grounds which would be sufficient to cause the same to be vacated by a complaint in equity or by a motion taking the place of a writ of error coram nobis. In the instant case, the motion to vacate was made within

...of which one of the ... of ...
...in ... on the day ...
...which he was ... and in the ...
...to ... on February 14, 1895, and ...
...elected to stand on the ...
...petition ... and ...
...and ... It is ...

The first ... of the order ...
...is that the ... did not have ...
...by ... of the ...
...after the ... had ...
...and ... The ...
...Court of ...
...Court ... to ...
...first ...
...by a bill in equity, Section 11 of the ...
...Section 11, ...
...order to ...
...shall be ...
...judgment, order or decree, ...
...as ...
...within thirty days after the entry of the ...
...shall be ...
...in equity or by a ...

the thirty day period and was overruled. The motion to vacate was entered on November 15, 1938, and overruled on November 16, 1938.

This court, in Flora v. Fields, 136 Ill. App. 341, p. 344, said:

"We think that such refusal was proper, because the statute gives to the Municipal Court power to vacate a judgment, on a petition filed for that purpose, only in cases where no motion to vacate is made within thirty days after the entry of the judgment, and in this case such motion was made and denied within thirty days from the entry of the judgment."

We agree with plaintiffs that the court did not have the right to vacate the judgment on the petition presented. It must be remembered that a petition under Section 21 of the Municipal Court Act cannot take the place of an appeal.

The second point made by plaintiffs is that the petition does not set forth grounds for vacating the judgment which would be sufficient to cause the same to be vacated by a bill in equity. As stated, a petition under Section 21 cannot be used as a substitute for an appeal. There is no showing of accident, fraud or mistake. The record shows that the motion to vacate the judgment was heard and that an order was entered overruling such motion. Therefore, we are of the opinion that a complaint in equity would not lie.

The motion entered on December 7, 1938, and which was postponed for consideration to December 22, 1938, has not been disposed of. The basis of the motion was asserted to be that the judgments were contrary to the law and to the evidence. Apparently, the defendant abandoned the motion of December 7, 1938, because on January 5, 1939, she filed the instant petition under Section 21.

We are of the opinion that it was the duty of the court to sustain plaintiffs' motion to strike the petition. For the reasons stated, the order of the Municipal Court of Chicago entered February 14, 1939, overruling the motion to strike and vacating the judgments, is reversed, and the petition of defendant is stricken.

ORDER OF THE MUNICIPAL COURT OF CHICAGO
REVERSED, MOTION TO STRIKE SUSTAINED AND
PETITION OF DEFENDANT STRICKEN.

DENIS E. SULLIVAN, P.J. AND HEBEL, J. CONCUR.

40973

PERSONAL LOAN & SAVINGS BANK, a
corporation,

Appellant,

v.

JOHN W. ANDERSON, W. J. WALLS,

Appellees.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO

302 I.A. 618

MR. JUSTICE BURKE DELIVERED THE OPINION OF THE COURT.

On June 20, 1931, the Municipal Court of Chicago entered a judgment by confession in favor of Personal Loan & Savings Bank, a corporation, and against Lillian I. Browder, John W. Anderson and W. J. Walls in the sum of \$111.00. A writ of execution was issued on the judgment on July 9, 1931. A demand on the execution was made on the defendant John W. Anderson on August 18, 1931, and a copy of the writ was delivered to him. A demand on the execution was made on the defendant W. J. Walls on August 21, 1931, and a copy of the writ delivered to him. On September 12, 1933, plaintiff filed a praecipe and statement of claim in the Municipal Court against the three defendants. The statement of claim was based upon the judgment and sought to recover the amount thereof, plus interest. The statement of claim was supported by an affidavit. On the same day the Clerk of the Municipal Court issued a summons directed to the three defendants, commanding them to appear on September 28, 1933. The bailiff made a return, certifying that he served the summons on defendant John W. Anderson on September 14, 1933, and on defendant W. J. Walls on September 15, 1933. The defendant Lillian I. Browder was not served. On September 28, 1933, the court entered the following judgment:

"This cause coming on for further proceedings on the writ of scire facias herein, it is considered by the Court that the plaintiff have judgment on the default herein, and that the judgment rendered in this cause by confession on June 20, 1931, against Lillian I. Browder, John W. Anderson and W. J. Walls for the sum of One Hundred Eleven and 00/100 Dollars (\$111.00) be revived as to John W. Anderson and W. J. Walls for full amount with costs of both proceedings."

On February 7, 1939, a writ of execution was issued by the Clerk of the

RECEIVED MAY 1 1961

RECEIVED

MAY 1 1961

RECEIVED

RECEIVED MAY 1 1961

302 L.A. 618

ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED

DATE 06-20-2001 BY SP-6 BJS/STP

INVESTIGATION IN ORDER TO DETERMINE IF A VIOLATION OF THE

ACT OF 1954 WAS COMMITTED. A COPY OF THE REPORT WAS

FORWARDED TO THE ATTORNEY GENERAL ON MAY 1, 1961, AND A COPY OF THE

REPORT WAS FORWARDED TO THE ATTORNEY GENERAL ON MAY 1, 1961, AND A COPY OF THE

REPORT WAS FORWARDED TO THE ATTORNEY GENERAL ON MAY 1, 1961, AND A COPY OF THE

REPORT WAS FORWARDED TO THE ATTORNEY GENERAL ON MAY 1, 1961, AND A COPY OF THE

REPORT WAS FORWARDED TO THE ATTORNEY GENERAL ON MAY 1, 1961, AND A COPY OF THE

REPORT WAS FORWARDED TO THE ATTORNEY GENERAL ON MAY 1, 1961, AND A COPY OF THE

REPORT WAS FORWARDED TO THE ATTORNEY GENERAL ON MAY 1, 1961, AND A COPY OF THE

REPORT WAS FORWARDED TO THE ATTORNEY GENERAL ON MAY 1, 1961, AND A COPY OF THE

REPORT WAS FORWARDED TO THE ATTORNEY GENERAL ON MAY 1, 1961, AND A COPY OF THE

REPORT WAS FORWARDED TO THE ATTORNEY GENERAL ON MAY 1, 1961, AND A COPY OF THE

REPORT WAS FORWARDED TO THE ATTORNEY GENERAL ON MAY 1, 1961, AND A COPY OF THE

Municipal Court and demand made thereon. The writ was returned unsatisfied on May 9, 1939. On June 2, 1939, a petition was filed in behalf of defendants John W. Anderson and W. J. Walls. The petition recited the previous proceedings in the case. It also stated that garnishment proceedings were instituted by the plaintiff, returnable June 1, 1939, that the Drexel State Bank was named as garnishee, and that on June 1, 1939, a judgment for the use of the plaintiff was entered against the garnishee. The petition further averred that the order of September 28, 1938, which purported to revive the judgment was "null and void and of no effect, for the reason that the said defendant, Lillian I. Browder, a party against whom the judgment was entered was not made a party in the proceedings to revive a judgment of this Court." It further stated that the proceedings for the revival of the judgment were irregular, inequitable, unfair and unjust to the defendants John W. Anderson and W. J. Walls. The petition concluded by praying that the order of September 28, 1938, "purporting to revive the judgment," be vacated, for the reason that the court was without jurisdiction to enter the order, and that all subsequent orders be vacated. On June 22, 1939, plaintiff filed a verified answer to the petition. The answer maintained that the court was without jurisdiction to vacate or amend the order of September 28, 1938, because more than 30 days had elapsed since the entry of such order. The answer also stated that personal service was had on the two defendants, and that they were also served with a copy of the statement of claim; that the proceedings which resulted in the order of September 28, 1938, were in accordance with rules 247 and 249 of the Municipal Court of Chicago and with the provisions of the Civil Practice Act, and that an execution based on the order of September 28, 1938, was served upon the defendants on April 28, 1939. On July 7, 1939, the court vacated the judgment entered on September 28, 1938. The defendants prosecute this appeal for the pur-

... The writ was returned under the seal of the court and bearing date thereon. On May 8, 1930, at Chicago, a petition was filed in behalf of defendant John W. Anderson and J. J. White. The petition recited the previous proceedings in the case. It also stated that respondent proceedings were instituted by the plaintiff, respondent June 1, 1929, that the record then was made as requested, and that on June 1, 1930, a judgment for the use of the plaintiff was entered against the respondent. The petition further averred that the order of September 22, 1930, which purported to revive the judgment was "null and void and of no effect" for the reason that the said defendant, William I. Anderson, a party against whom the judgment was entered, was not made a party to the proceedings to revive a judgment of this Court. It further stated that the proceedings for the revival of the judgment were irregular, incomplete, unfair and unjust to the defendant John W. Anderson and J. J. White. The petition concluded by praying that the order of September 22, 1930, purporting to revive the judgment, be annulled, for the reason that the court was without jurisdiction to enter the order, and that all subsequent orders be vacated. On June 22, 1930, plaintiff filed a verified answer to the petition. The answer main- tained that the court was without jurisdiction to vacate or annul the order of September 22, 1930, because more than 60 days had elapsed since the entry of such order. The answer also stated that respondent had bid on the two defendants, and that they were also served with a copy of the statement of claim; that the proceedings which re- sulted in the order of September 22, 1930, were in accordance with the rules of the United States Court of Appeals and with the pro- visions of the Civil Practice Act, and that no exception could be taken at September 14, 1930, was served upon the defendant at that time. On July 7, 1930, the court granted the judgment entered on September 22, 1930. The defendant's response to this appeal was filed on

pose of sustaining the order reviving the judgment and reversing the order vacating such judgment of revival. The defendants did not file an appearance or brief in this court.

Judgments of a court of record may be revived at any time within 20 years from rendition by an ordinary civil action at law, or by a writ of scire facias. Under the old practice, when a writ of scire facias was not used, the form of the action was in debt. This appeal can be resolved by deciding whether the Municipal Court had jurisdiction to vacate the order reviving the judgment. The defendants were served with summons and with a copy of the statement of claim. The order reviving the judgment was entered on September 28, 1938. The motion to vacate was presented to the court on June 2, 1939. Under Section 21 of the Municipal Court Act and under rule 209, that court does not have power to set aside or modify a final order or decree after 30 days from the entry thereof, except by petition setting forth grounds which would be sufficient to warrant the same to be set aside or modified by a complaint for equitable relief, or which would be sufficient as a basis for relief at common law by writ of error coram nobis. The petition in the instant case was filed more than eight months after the entry of the judgment of revival. It does not set forth any ground for equitable relief; nor does it attempt to excuse the delay in waiting for such a long period of time before seeking relief. A motion in the nature of a writ of error coram nobis does not lie to correct errors of law. That writ is for the purpose of correcting errors of fact by calling the court's attention to matters which the court did not know at the time the judgment was entered. Here, the alleged error complained of, if any, was one of law. The petition charged that the court, in entering the order of revival as to two of the three judgment debtors, committed error. It is obvious, therefore, that the court on September 28, 1938, knew that it was entering a judgment reviving the preceding judgment

case of reversal, the order reversing the judgment was reversed the
order reversing such judgment of reversal. The defendant did not file an
agreement to trial in this court.

Statements of a court of record may be revised at any time after

in 30 years from rendition by an ordinary civil action at law, or by a

bill of replevin. Under the old practice, when a bill of replevin

was not used, the law of the action was in doubt. This appears from the

practice of sending replevin bills to the court for judgment as to

whether the action was replevin. The defendant was not to be

reversed and with a copy of the statement of claim. The order reversing

the judgment was entered on September 11, 1880. The bill was

not presented to the court on June 1, 1880. Under section 11 of the

original court act and under Code 1880, that court does not have power to

set aside or modify a final order or decree after 30 days from the entry

thereof, except by petition signed by the party who would be

adversely affected by the order and who is not a party to the

order. The petition must be signed by the party who would be

adversely affected by the order and who is not a party to the

order. It must be signed by the party who would be

adversely affected by the order and who is not a party to the

order. It must be signed by the party who would be

adversely affected by the order and who is not a party to the

order. It must be signed by the party who would be

adversely affected by the order and who is not a party to the

order. It must be signed by the party who would be

adversely affected by the order and who is not a party to the

order. It must be signed by the party who would be

adversely affected by the order and who is not a party to the

-4-

as to two of the three judgment debtors. We are not deciding that such action was erroneous. The court had jurisdiction of the subject matter and of the parties. The defendants did not choose to appear and defend the action in due time. If the defendants considered that the court committed error in entering the order of revival after 30 days, their remedy was to appeal to this court. They, however, improperly invoked the procedure by petition. A petition under Section 21 of the Municipal Court Act cannot serve the office of an appeal.

We are of the opinion that the Municipal Court of Chicago committed error in vacating the order reviving the judgment. For the reasons stated, the order entered on July 7, 1939, which vacated the order of revival, is reversed, and the cause is remanded with directions to dismiss the petition of John W. Anderson and W. J. Walls.

ORDER OF JULY 7, 1939 REVERSED AND
CAUSE REMANDED WITH DIRECTIONS

NABEL, J., and DENIS E. SULLIVAN, P.J., CONCUR.

... to see of the three judgments... as one was...
... The court has jurisdiction of the subject matter
... The defendant did not choose to appear and defend
... If the defendant contended that the court
... in entering the order of removal after 30 days, their
... They, however, improperly assumed
... A petition under section 11 of the Municipal
... the office of an agent.

... the Municipal Court of Chicago was
... the petition for the removal of the defendant
... the petition for the removal of the defendant
... the petition for the removal of the defendant
... the petition for the removal of the defendant
... the petition for the removal of the defendant

ORDER OF JULY 7, 1900
JAMES A. HARRIS, JUDGE

... and JOHN E. HARRIS, J. J. HARRIS.

40519

JAMES L. COOKE and ELISE MAE COOKE,

(Plaintiffs) Appellants,

v.

VERNON H. LOUCKS, CHARLES O. LOUCKS,
WALTER H. ECKERT, and A. R. PETERSON
and JOHN O. PETERSON, co-partners doing
business under the firm name of LOUCKS,
ECKERT & PETERSON,

(Defendants) Appellees.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

302 I.A. 613'

MR. JUSTICE NEBEL DELIVERED THE OPINION OF THE COURT.

This action, the subject of the plaintiffs' appeal, was an action at law in the nature of an action for money had and received. The defendants filed motions for judgment, upon the ground that the amended complaint did not state a cause of action. The trial judge entered an order sustaining the motions of the defendants to strike the amended complaint of the plaintiffs and to enter judgment for the defendants, and as we have indicated, the plaintiffs appeal from the judgment so entered by the court.

From plaintiffs' statement of facts, the amended complaint alleges that the plaintiffs are husband and wife, and that the plaintiff, James L. Cooke, was a partner with one Madenoch in the brokerage firm of James L. Cooke & Co., and that defendant, Vernon H. Loucks, was attorney for Madenoch, who caused the defendants, composing the firm of Loucks, Eckert and Peterson, to be employed as attorneys for James L. Cooke & Co.

That Madenoch negotiated with Charles O. Robbins & Co., for taking over the Cooke firm, upon terms whereby Madenoch would become a partner in the Robbins firm and his membership therein should be paid for by plaintiffs in the sum of \$100,000; and that the defendants were employed by Madenoch to negotiate two contracts, (1) one between Madenoch and the plaintiffs, and (2) another between the partners of the Robbins firm and Madenoch and the plaintiff, James L.

JAMES L. GOSKIN, JR. and JAMES L. GOSKIN, JR.

(Plaintiffs)

VERSUS

JOHN A. GOSKIN, JR. and JAMES L. GOSKIN, JR.

and JAMES L. GOSKIN, JR. and JAMES L. GOSKIN, JR.

and JAMES L. GOSKIN, JR. and JAMES L. GOSKIN, JR.

(Defendants)

(Continued)

302 I.A. 613

...action is now in the nature of an action for money had and received. The defendants filed motions for judgment, upon the ground that the amended complaint did not state a cause of action. The trial judge entered an order sustaining the motion of the defendants to strike the amended complaint of the plaintiffs and so enter judgment for the defendants, and as we have indicated, the plaintiffs appeal from the judgment so entered by the court.

The plaintiffs' statement of facts, the amended complaint alleges that the plaintiffs are husband and wife, and that the plaintiff, James L. Goskin, was a partner with the defendant in the partnership firm of James L. Goskin & Co., and that defendant, Vernon A. Goskin, was attorney for defendant, who caused the defendant, comprising the firm of Goskin, Goskin and Goskin, to be assigned as attorneys for James L. Goskin & Co.

That defendant negotiated with Charles E. Goskin & Co., for taking over the Goskin firm, upon terms whereby defendant would become a partner in the Goskin firm and his membership therein should be paid for by plaintiffs in the sum of \$100,000; and that the defendants were employed by defendant to negotiate the contracts, and between defendant and the plaintiffs, and (7) whether between the partners of the Goskin firm and defendant and the plaintiffs, James L.

Cooke, composing the Cooke firm; that the defendants in said negotiations represented Badenoch solely, and did not act for the plaintiff James L. Cooke, which was fully understood by the defendants; that as a result of said negotiations two contracts were executed, one between the plaintiffs and Badenoch and another between the Robbins firm, Badenoch and the plaintiff, James L. Cooke. These contracts provided for the dissolution of the Cooke firm, that the assets of the Cooke firm, a part of which were owned by the plaintiff, Elsie Main Cooke, should be transferred to the Robbins firm, and after liquidation should be placed in books of the Robbins firm in an account to be known as "David A. Badenoch Special Capital Account," that Badenoch was to have no right to use any of said account, but that all debts of James L. Cooke & Co., were to be paid therefrom, that interest to be paid thereon by the Robbins firm was to be turned over by Badenoch to the plaintiff, Elsie Main Cooke, and that on or before July 1, 1932, Badenoch was to pay over to Elsie Main Cooke all the net remainder of said account; that Badenoch had only a nominal interest in said account and that the plaintiffs were the real owners thereof; that the assets of plaintiffs were transferred to the Robbins firm and the proceeds thereof placed in said Badenoch Special Capital Account; That on April 21, 1930, the defendants sent to the plaintiffs two bills addressed to James L. Cooke & Co., which firm was known to the defendants to be then dissolved. One was in the sum of \$1,500 for legal services in re negotiations and closing deal with Charles D. Robbins & Co. The other was in the amount of \$12,500 plus \$322.14 for cash disbursements for legal services to James L. Cooke individually in connection with Charles E. Facker claims; that copies of these bills were sent to Badenoch and to the Robbins firm and Badenoch requested the plaintiff, Elsie Main Cooke, to "make any comment which you care to make, as no doubt they will be shortly looking to us for payment

...the books (1911) in the balance in this regard -
 same represented various claims, and his was not the liability
 James L. Cook, which was fully satisfied by the defendant; that
 on a result of said satisfaction two contracts were executed, one
 between the plaintiff and defendant and another between the plaintiff
 and James L. Cook. These contracts
 provided for the satisfaction of the books (1911) that the assets of
 the books (1911) a part of which were owned by the plaintiff, and after
 their books should be returned to the plaintiff, and after
 liquidation should be placed in books of the plaintiff firm in an
 account to be known as "James L. Cook's Special Capital Account,"
 that defendant was to have no right to any of said account, and
 that all debts of James L. Cook & Co., were to be paid therefrom,
 that interest be paid thereon by the plaintiff firm as of the
 amount due to defendant as of the plaintiff, that said books, and
 that on or before July 1, 1911, defendant was to pay over to plaintiff
 their books all the net remainder of said account; that defendant had
 only a nominal interest in said account and that the plaintiff were to have
 the real control thereof; that the assets of plaintiff were to be
 turned to the plaintiff firm and the various interests placed in said
 defendant Special Capital Account; that on April 21, 1911, the
 defendant gave to the plaintiff the bills returned as James L.
 Cook & Co., that they were known as the defendant as of the date
 specified. The sum of \$12,500 the legal balance in the
 defendant and placed with James L. Cook & Co., the
 amount was in the amount of \$12,500 when James L. Cook & Co. were
 made for legal services to James L. Cook & Co. in connection with the
 said account. James L. Cook & Co. placed at James L. Cook & Co. were
 to defendant and to the plaintiff firm and defendant transferred the
 defendant, that said books, as "new" and "new" when they were
 in fact, as an amount they will be exactly equal to the amount

that on April 24, 1930, the plaintiff, Elsie Main Cooke, advised Madenoch and Charles W. Robbins & Co. not to pay the bill for \$1,500 because the services were not rendered to the plaintiffs but to Madenoch; that on May 8, 1930, attorneys for plaintiffs notified Robbins that the plaintiffs considered that the \$1,500 bill was for services which were not rendered to the plaintiffs but was for services rendered to Madenoch for the special and particular benefit and advantage of Madenoch and at Madenoch's request; that the plaintiff never requested nor authorized the rendering of the services; that the bill for \$12,500 was excessive, and that if the Robbins firm paid said bills or either of them they would do so at their peril. It is further alleged in the amended bill of complaint that the services of the defendants in the Fucker matter were rendered to the plaintiff, James L. Cooke, individually, and not to the plaintiff, Elsie Main Cooke, nor were said services rendered to the firm of James L. Cooke & Co., which was in fact dissolved at the time when all or practically all of said services were performed; that the charge of \$12,500.00 was highly excessive and that the payment from Madenoch's Special Capital Account was improperly made to the defendants with defendants' knowledge of all of the circumstances and at defendants' direction; that the services rendered as to the other items for which \$1,500 was charged were services rendered to Madenoch and not to the former firm of Cooke & Co.; that by reason of the premises the Madenoch Special Capital Account was reduced by the sum of \$14,238.14; that because of the insolvent condition of the Robbins firm and the partners thereof, the plaintiffs have been unable to collect any part of the money due them and that the defendants have received and retain said sum, which in justice and in right should be returned to the plaintiffs.

To this amended complaint two motions were made, one by the defendants, Walter H. Bokert, Abe H. Petersen and John B.

that on April 24, 1940, the plaintiff, John Wain Cook, advised
defendant and himself that he would pay the bill for
the services rendered by the defendant for the plaintiff and
for himself, that on May 4, 1940, defendant the plaintiff notified
himself that the plaintiff's account for the 1,500 bill was for
services which were not rendered to the plaintiff but was for
services rendered to defendant for the plaintiff and defendant himself
and charges of defendant and is defendant's property, and the plaintiff
did never request nor authorized the rendering of the services;
that the bill for 1,500 was excessive, and that if the plaintiff
then paid said bill or either of them they would be as of their
own. It is further alleged in the amended bill of complaint that
the services of the defendant in the books were not rendered
to the plaintiff, James L. Cook, individually, but was for the
plaintiff, John Wain Cook, not with said services rendered to the
firm of James L. Cook & Co., which was in fact dissolved at the
time when all or substantially all of said services were rendered;
that the charge of 1,500.00 was highly excessive and that the
payment from defendant's special fiscal account was improperly made
to the defendant with defendant's knowledge of all of the circumstances
and of defendant's situation; that the services rendered to
the other firm for which 1,500 was charged were services
rendered to defendant and not to the former firm of James L. Cook,
and by reason of the payment the defendant special fiscal account
was reduced by the sum of 1,500.00; that because of the plaintiff's
misstatement of the plaintiff's firm and the plaintiff's firm, the plaintiff
did have been unable to collect any part of the money due him
and that the defendant has received and retains said sum, which in
justice and in right should be returned to the plaintiff.

To this account defendant has rendered no answer, and by
the defendant, James L. Cook, the plaintiff and defendant.

Peterson for dismissal, assigning three grounds. The other defendants, Louks, filed two motions. The first assigned thirteen grounds for dismissal and the second assigned three grounds for dismissal, and upon consideration of these motions, the court entered a judgment of dismissal.

The plaintiffs contend that this action for money had and received is an action at law equitable in its nature, liberal in form and greatly favored by the courts, and that this is so irrespective of whether the money was received from the plaintiffs or from a third person. In reply to this suggestion it is urged by the defendants that the plaintiffs argue that these defendants had no right to accept money belonging to the plaintiffs, but say in this case it was not the plaintiffs' money, but Robbins & Co.'s money that was paid to the defendants, and further suggest that the amended complaint sets forth that after Robbins & Co. paid their own money to the defendants they wrongfully charged such payment to the David A. Badenoch Special Capital Account. It does appear from the amended complaint that the assets of James L. Cooke & Company, a partnership alleged to consist of James L. Cooke and David A. Badenoch, were transferred to Robbins & Co., so that Robbins & Co. owned and acquired complete title to these assets, and they of course, according to the contract, had the right to sell all of these assets, and after paying the creditor, James L. Cooke & Co., the remainder of the proceeds were to be placed in the David A. Badenoch Special Capital Account, which capital account belonged to Robbins & Co. and was part of their capital assets, and the only rights which the plaintiffs have are those provided by the contract, to-wit: "On or before July 1, 1932, the said Badenoch was to pay over to the plaintiff, Elsie Main Cooke, all assets to which the said Badenoch, as a former partner in said firm of James L. Cooke & Co. might then be entitled from the net remainder in said David A. Badenoch Special Capital Account, including

all title and interest of the said Madenoch to any such remainder."

The question then arises was this money paid to these defendants by Robbins & Co. taken from a special fund which had been realized from the sale of the assets turned over to Robbins & Co. by James L. Cooke & Co. It appears from the amended complaint that more than two years prior to July 1, 1932, on to-wit May 9, 1930, Robbins & Co. turned over and delivered to the defendants certain checks drawn on their personal account. In other words, it is urged that the funds which were paid to the defendants were Robbins & Co.'s own property.

The defendants urge that Charles D. Robbins & Co. who were solvent at the time of the payment, had a right to pay their own money to the defendant if they chose to do so, and the only thing about the transaction of which the plaintiffs could complain was that Robbins & Co. thereafter charged the payment to the David A. Madenoch Special Capital Account. That would seem to be true, and payment of moneys that were to be used by Robbins & Co. to take care of the creditors under the terms of the contract would have to be accounted for to the plaintiffs. The plaintiffs could hold Robbins & Co. responsible for any improper charge to that account, they having also warned Robbins & Co. that if they saw fit to pay the bills of the defendants "they would do so at their own peril."

There is no allegation of any complaint that objections were made at any time to these defendants, either before the bills were rendered or the payment thereof, prior to the bringing of this suit, or at the time it was instituted.

The title to the assets of James L. Cooke & Co. was transferred to Robbins & Co., and we indicated that fact in our opinion filed in the case of Cooke v. Madenoch, 281 Ill. App. 601. (abst.) in which we quoted Par. 10 of this contract, which is as follows:

all bills and interests of the said company to any other company.

The question then arises as to how many bills to these
testimony of Johnnie & Co. taken from a special book which had
been received from the sale of the assets turned over to Johnnie
& Co. by James L. Moore & Co. It appears from the account contained
that more than two years prior to July 1, 1901, on or about May 3,
1900, Johnnie & Co. turned over and delivered to the respondents
certain assets which were held in trust for the respondents, it
is argued that the assets which were held in the respondents were
Johnnie & Co.'s own property.

The respondents urge that Johnnie & Co. and
were solvent at the time of the payment, had a right to pay
their own money to the respondents if they chose to do so, and the
only thing about the transaction of which the respondents could
complain was that Johnnie & Co. thereupon changed the payment to
the respondents' special account. That would seem to
be true, and payment of money that was to be made by Johnnie &
Co. to take care of the respondents under the terms of the contract
would have to be accounted for to the respondents. The respondents
could not complain that the respondents had any improper motive in doing
so. They could not complain that the respondents did not pay their own
bills or the bills of the respondents. They could do no other than

There is no allegation of any concealment or objection
were made at any time to these respondents, either before the bills
were received or the payment thereof, or as the winding up of this
case, or at the time it was instituted.

The bills in the account of James L. Moore & Co. were
received by Johnnie & Co. and as indicated that they in any way
lied in the bill of James L. Moore & Co. (Exhibit) is
which we stated was in this contract, which is as follows:

"Par. 10. Cooke assigns to Madenoch all interest in the net credit balance in the Special Capital Account which net credit balance shall become an additional contribution of Madenoch to the new firm of Charles D. Robbins & Co.

First parties (Robbins & Co.) shall be under no obligation whatsoever to said James L. Cooke or to Elsie Main Cooke on account of such contribution of capital or any such additional contribution of capital to said first parties or otherwise, with respect to this agreement, and no notice or anything contained in any other agreement, between said James L. Cooke and/or Elsie Main Cooke and/or David A. Madenoch shall be deemed to affect in any respect the provisions of this agreement or the obligations of first parties thereunder."

It does not appear that the plaintiffs owned or had the right to the possession of any assets in the Davis A. Madenoch Special Capital Account, or any right whatever as against Robbins & Co. As we have already indicated, the capital account was part of the capital assets of Robbins & Co. and was a contribution to the assets of David A. Madenoch. The only right of the plaintiffs as alleged in the amended complaint was to receive from David A. Madenoch on or before July 1, 1932, such interest as Madenoch might have in said capital account at that future time. That appears from the allegation of the plaintiffs in their complaint that they were entitled to receive only such assets as Madenoch might be entitled to from the net remainder of the capital account on July 1, 1932, and it is not alleged or charged that Madenoch had any interest in the account in 1932. As suggested by the defendants, the only allegation in the complaint as to just what interest Madenoch had in said account is that "said Madenoch was to have no right to use any part of said account," and the contract provided that the proceeds of such capital account were first to be used by Robbins & Co. to pay all the debts of James L. Cooke & Co. It does not appear from the allegations of the amended complaint that there were ever any funds left in said capital account after the payment of the debts of James L. Cooke & Co., or that the debts of James L. Cooke & Co. have ever been paid.

The plaintiffs' theory is that the action for money had

and received is one in which the plaintiff may recover from the defendant for money in his possession, however he may have come by it, which in equity and right he had no right to retain. The person to whom the money belongs in equity and right has an action for it. While as a general rule it is true that the common counts constitute an equitable action, still where there is nothing to indicate from the record that there is no further service to be performed by the trustee but to turn over the funds to the plaintiff, until then there can be no recovery. In Perry on Trusts, 6th ed. Par. 843, the author says:

"An action at law for money had and received will not lie against a trustee while the trust is still open, but if a final account is settled and a balance struck, an action may be maintained."

In Gloyd v. Hotel La Salle Co., 221 Ill. App. 104, the court said:

"The principle so relied upon is that whenever a person has money in his possession, however he may have come by it and which ex aequo et bono he has no right to retain, the person to whom it belongs may maintain an action for it as for money had and received."

It does not appear from any allegation in this case that the duties of the so-called trustee or constructive trustees with respect to the funds had been fully performed so that the trustees no longer "had any right to retain the trust fund." And it does not appear from any allegation that the debts of James L. Cooke & Co. had been fully paid, nor that the trust had been fully discharged so that there was no longer anything for the trustee to do but pay the balance of the money over to the plaintiffs.

and then we held in Sanik v. Fisher-Stoddard Cafeteria Co., 238 Ill. App. 174; that the common counts will not lie where there is a subsisting, uncompleted or unexecuted agreement. See Metal Fire Proofing Co. v. Boyce, 233 Ill. 284, and Feder v. Midland Casualty Co., 316 Ill. 552.

and received is one in which the plaintiff may recover from the defendant for money in his possession, however he may have come by it, which is equity and which he has no right to retain. The person to whom the money belongs in equity and right has an action for it. While on a general rule it is true that the common counts constitute an equitable action, still where there is nothing to indicate from the record that there is no further remedy to be performed by the trustee but to turn over the funds to the plaintiff, until then there can be no recovery. In Perry on Trusts, 6th Ed. Par. 645,

THE AUTHOR SAYS:

"An action at law for money had and received will not lie against a trustee while the trust is still open, but if a final account is rendered and a balance struck, an action may be maintained."

In Glavin v. Hotel de Ville Co., 221 Ill. App. 104, the

COURT SAID:

"The plaintiff is entitled to a final account of the trustee and money is due him. He is not entitled to a final account of the trustee which is an action at law. The person to whom it is due may maintain an action for it at law and recover."

It does not appear from any allegation in this case that the duties of the so-called trustee or constructive trustee with respect to the funds had been fully performed so that the trustee no longer "had any right to retain the trust fund." And it does not appear from any allegation that the duties of James L. Cook & Co. had been fully performed, nor that the trust had been fully discharged so that there was no longer anything due the trustee to do but pay the balance of the money over to the plaintiff.

AND NOW WE SAY IN Glavin v. Hotel de Ville Co.:

2d., 221 Ill. App. 104; that the common counts will not lie where there is a separating, uncompleted or unperfected agreement. See Hotel de Ville Co. v. Glavin, 221 Ill. App. 104, and Glavin v. Hotel de Ville Co., 221 Ill. App. 104.

From the allegations it appears that Robbins & Co., the receiver of the assets to be used for the purpose of paying the creditors of the James L. Cooke & Co., is obliged to account for their acts and doings in the premises, and until they do so the plaintiffs have no title to sue for and collect funds that were to be used by Robbins & Co. in settling claims of the creditors, and title for the purpose indicated is in Robbins & Co., and there is nothing in the amended bill of complaint which would indicate that the sum - the subject of this lawsuit - is the property of the plaintiffs, which they are seeking to recover irrespective of the provisions of the Robbins' Co. contract.

We believe that the court was justified in striking the amended complaint and in entering judgment for the defendants. The judgment is affirmed.

JUDGMENT AFFIRMED.

DENIS E. SULLIVAN, P.J. AND BURKE, J. CONCUR.

That the allegations in the complaint are true is not in dispute.

Complaint of the facts as to the payment of money for the purchase of the James H. Cook & Co., is alleged to amount to their acts and omissions in the purchase, and that they do not the plaintiffs have no title to sue for the alleged facts that were so alleged by Cook & Co. in selling same of the complaint, and also for the purpose indicated in the complaint, and there is nothing in the complaint which would indicate that the same - the subject of this lawsuit - is the property of the plaintiffs, which they are seeking to recover possession of the proceeds of the alleged sale. Complaint.

It is believed that the court was justified in setting the

complaint aside and in granting judgment for the defendants.

The judgment is affirmed.

THOMAS J. BROWN.

WILLIAM A. BROWN, J. L. AND SON, J. BROWN.

40718

FELDMAN BROTHERS COMMISSION, INC.,
a corporation,

(Plaintiff) Appellant,

v.

WESTERN TREE COMPANY, a corporation,
C. H. ROBINSON COMPANY, a corporation,
and E. J. GULDON,

(Defendants) Appellees.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

302 I.A. 613²

MR. JUSTICE NEBEL DELIVERED THE OPINION OF THE COURT.

This was an action instituted by the Feldman Brothers Commission, Inc., a corporation, plaintiff, against the Western Tree Company, a corporation, C. H. Robinson Company, a corporation, and E. J. Guldon, to recover the purchase price and damages arising out of fraudulent substitution of poorly foliated and internally brown Christmas trees in lieu of "Montana Fir Christmas trees", which the defendants, in writing, agreed to deliver at a stipulated price. The defendant, Western Tree Company - not authorized to do business in Illinois - was defaulted and judgment was entered. The other two defendants made a motion to strike the plaintiff's second amended complaint, which was allowed, and judgment for the defendants was entered by the court.

The contract in question was attached as Exhibit 1A and signed as follows: "Feldman Brothers, Signed S. Feldman, Buyer; Western Tree Company, Seller; By C. H. Robinson Company, Broker or Salesman.

I hereby certify that I am authorized by the seller named above, as his broker or salesman, to fill out this Standard Confirmation of Sale and sign and authenticate the same in his behalf. E. J. Guldon." It is suggested by the defendants that an agent is not liable on a contract made on behalf of his principal if the other party knew of the agency. The contract conclusively shows that these defendants, C. H. Robinson Company and E. J. Guldon

THE UNITED STATES DISTRICT COURT
 SOUTHERN DISTRICT OF NEW YORK
 IN SENATE CHAMBER, NEW YORK, N. Y.
 J. J. CALDON, Plaintiff,
 vs.
 J. J. CALDON, Defendant.

3081A-618

1. The contract in question was entered into by the parties
 on or about the 1st day of January, 1918, at New York, New York.
 2. The contract was made between the Plaintiff and the Defendant,
 J. J. Caldon, a corporation, and J. J. Caldon, an individual,
 who at the time of the making of the contract was the sole
 owner and operator of the business of the Plaintiff.
 3. The contract was made for the purpose of the Defendant
 acting as the exclusive agent of the Plaintiff in the
 sale of the Plaintiff's goods in the Southern District of New York.
 4. The contract provided that the Defendant should pay to the
 Plaintiff a commission of ten per cent on all goods sold by the
 Plaintiff through the Defendant.
 5. The contract further provided that the Defendant should
 pay to the Plaintiff a salary of \$10,000 per annum.
 6. The contract was made for a term of one year, and was
 renewed for a second year.
 7. The contract was made in violation of the provisions of the
 Sherman Anti-Trust Act, and is therefore void and unenforceable.
 8. The Plaintiff is entitled to recover from the Defendant the
 amount of the commission and salary paid to the Defendant under
 the contract, together with interest thereon.

were only brokers and solicitors and that they did not bind themselves.

In the case of Chicago Title & Trust Co. v. De Lussaux, 336 Ill. 522, the court held that:

"Where an agent in making a contract discloses his agency and the name of his principal, or where the party dealing with the agent knows that the agent is acting as an agent in making the contract, the agent is not liable on the contract unless he agrees to become personally liable."

From an examination of the second amended complaint no allegation is made that the defendants did not disclose their agency or the name of the principal, for that appears from the agreement, the basis of this action, and from an examination of this same contract the plaintiff is chargeable with the fact that the agents in making the contract did not agree to become personally liable for any violation of or default in the performance of the contract. So, upon examining the contract we find nothing whereby the defendants would become liable as agents of the principal, and we believe that a motion for a further amendment by the plaintiff would not create liability of these defendants under the terms of the contract, and the court properly denied this motion.

The plaintiff calls our attention to several provisions of the Civil Practice Act which have to do with the method of properly preparing the pleadings necessary to constitute a cause of action, and as we have stated, we do not think from the face of the contract in question there is anything which would create a liability of the defendants.

The defendants contend that the plaintiff must plead and prove notice to the shipper or his agent of any alleged breach of contract within twenty-four hours after being notified of the arrival of the merchandise about which complaint is made. However,

was only because and solicitors and it is not said that

advice.

In the case of Windsor v. Turner, 111 N. 100.

111 N. 100, the court said that:

"There is no doubt in making a contract the parties are
not bound to the same, or where the party dealing with the
other knows that the agent is acting as an agent in selling the
property, the agent is not liable on the contract unless he
is shown to be personally liable."

From an examination of the second amended complaint no

allegation is made that the defendant did not disclose their agency
or the name of the principal, but that appears from the complaint.

The basis of this action, and from an examination of this case

against the plaintiff is that the defendant is liable for the same

in making the contract and that the defendant is personally liable for

any violation of the contract in the performance of the contract, so

that the defendant is liable for the same unless the defendant

would become liable as agent of the plaintiff, and to believe that

a action for a further remedy by the plaintiff would not create

liability of these defendants under the terms of the contract, and

the court properly denied this action.

The plaintiff's bill was amended to several provisions of

the Civil Practice Act which have to do with the method of properly

proving the plaintiff's remedy as against a person of credit,

and as we have stated, we do not think that the two of the contract

is material there is nothing which would create a liability of

the defendant.

The defendant answers that the plaintiff has been and

been liable to the plaintiff as agent of the plaintiff in the

business of the plaintiff's company which is being carried on by

virtue of the contract which was made in 1911, and

3

from the conclusion we have reached that the defendants C. B. Robinson Company, a corporation, and E. J. Goulden are not liable under the terms of the contract it will not be necessary to consider this question.

For the reasons stated the judgment for the defendants entered by the court is affirmed.

JUDGMENT AFFIRMED.

DENIS E. SULLIVAN, F.J. AND BURKE, J. CONCUR.

After the close of the summer I will not be able to
continue beyond a certain point, but I will be able to
take the summer and have enough to last the winter.

[illegible]

RECEIVED 1997 JAN 20

THE UNIVERSITY OF CHICAGO

[illegible]

40737

PHILIPPINE KURZ,

(Plaintiff) Appellee,

v.

WILLIAM KURZ,

(Defendant) Appellant.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

302 I.A. 621

MR. JUSTICE HANEL DELIVERED THE OPINION OF THE COURT.

This is an appeal by the defendant, William Kurz, from an order entered by the court on January 27, 1938, adjudging the defendant guilty of contempt of court and directing that he be committed to the County Jail of Cook County for failure to pay to the plaintiff the sum of \$625.00 alleged to be due to her from him by virtue of said order entered on August 6, 1937. By this appeal the defendant also prays for the reversal of another order entered on the 27th day of January, 1938, directing him to pay to the Master in Chancery Denis E. Sullivan, Jr., to whom certain matters in said cause had been referred, the sum of \$167.70 for fees, which he claimed had been earned by him for services upon said reference, and to the allowance of which fees the defendant has filed objections.

This cause was originally a separate maintenance proceeding, filed by the plaintiff against the defendant in the Superior Court of Cook County on the 3rd day of August, 1937. Subsequently pursuant to leave of court granted on the 26th day of August, 1937, the plaintiff filed on the 27th day of August, 1937, an amended complaint for divorce against the defendant, in which she charged that the defendant had been guilty of extreme and repeated cruelty toward her. On the 15th day of September the defendant filed an answer to the amended complaint, in which he denied the alleged acts of cruelty. The defendant, subsequently, on the 15th day of October, 1937, filed a counterclaim for divorce against the plaintiff, in which he alleged that the plaintiff had been guilty of extreme and repeated cruelty

PLATE

PLATE 1000

(PLATE 1000) 1000

PLATE 1000

(PLATE 1000) 1000

8081A.021

1. THE COURT HEREIN FINDS THE EVIDENCE TO BE

THIS IS AN ORDER BY THE COURT, WILLIAM B. BROWN, JUDGE

AS ORDERED BY THE COURT ON JANUARY 17, 1937, ADJUDGING THE

DEFENDANT GUILTY OF CONTEMPT OF COURT AND DIRECTING THAT HE BE

CONFINED TO THE COUNTY JAIL OF JACKSON COUNTY FOR THREE MONTHS

THE PLAINTIFF THE SON OF 1937.00 ALLEGED TO BE ONE OF THE MEN

BY VIRTUE OF SAID ORDER ENTERED ON AUGUST 8, 1937. BY THIS ORDER

THE DEFENDANT ALSO PAYS FOR THE REVERSAL OF ANOTHER ORDER ENTERED

ON THE 27TH DAY OF JANUARY, 1937, DIRECTING HIM TO PAY TO THE MASTER

IN EXCESSIVE DEDUCTIONS, 17, TO WHOM CERTAIN MONIES IN SAID

ORDER HAD BEEN ENTERED, THE SON OF 1937.00 FOR THE YEAR, WHICH HE CLAIMED

HAD BEEN ENTERED BY HIM THE DEFENDANT WHEN SAID ORDER WAS ENTERED, AND IN THE

ALLEGATIONS OF WHICH THE DEFENDANT HAS BEEN OBJECTING.

THIS CASE WAS ORIGINALLY A CRIMINAL PROSECUTION PROCEEDING

FILED BY THE PLAINTIFF AGAINST THE DEFENDANT IN THE DISTRICT COURT OF

JACKSON COUNTY ON THE 27TH DAY OF JANUARY, 1937. SUBSEQUENTLY

HE LEAVE OF COURT GRANTED ON THE 27TH DAY OF JANUARY, 1937, THE ORDER

FILED FILED ON THE 17TH DAY OF JANUARY, 1937, AN ORDER CONSIDERING FOR

REVERSAL AGAINST THE DEFENDANT, IN WHICH HE ORDERED THAT THE DEFENDANT

HAD BEEN GUILTY OF CONTEMPT AND REQUESTED JUDICIAL REVIEW. IN THE

1937 DAY OF JANUARY THE DEFENDANT FILED AN ANSWER TO THE ORDERED

REVERSAL, IN WHICH HE DENIED THE ALLEGED FACTS OF CONTEMPT. THE

DEFENDANT, SUBSEQUENTLY, ON THE 17TH DAY OF JANUARY, 1937, FILED A

REVERSAL FOR REVERSAL AGAINST THE PLAINTIFF, IN WHICH HE ALLEGED

THAT THE PLAINTIFF HAD BEEN GUILTY OF CONTEMPT AND REQUESTED JUDICIAL

toward him. The plaintiff and cross-defendant filed an answer to this counterclaim in which she denied she had committed the alleged acts of cruelty. On the 13th day of October, 1937, the defendant filed his petition praying that the order of August 6, 1937, be vacated and held for naught, and that certain moneys paid to the plaintiff pendente lite be returned to him. This petition was referred on October 26, 1937, to the Master in Chancery for hearing. On November 2, 1937, testimony was taken before the Master, pursuant to the above reference, and on November 9, 1937, the Master filed his report herein finding that the plaintiff, during the pendency of this suit, is entitled to receive support and maintenance from her husband after considering the evidence concerning the condition and life of the parties and their circumstances, and further recommends in said report that the defendant's petition to vacate the order of August 6, 1937, be denied. Thereafter on November 9, 1937, an order was entered approving the master's report, and denying the petition of the defendant to vacate the order of August 6, 1937. No appeal from this order was taken by the defendant.

On November 18, 1937, the plaintiff filed a petition for a rule to show cause against the defendant for failure to pay past due alimony. The defendant answered said petition on November 26, 1937, and he again set up in said answer his alleged defense that the order of August 6, 1937, was void as the court never had jurisdiction of the subject matter. On December 2, 1937, the defendant filed his amended answer to the plaintiff's petition of November 18, 1937, in which he alleges the same facts as set forth in his answer of November 26, 1937, and in addition thereto alleges that the plaintiff committed adultery on November 14, 1937, and that therefore the plaintiff's petition of November 18, 1937 was not filed in good faith

However, the Plaintiff and several Defendants filed an answer to this counterclaim in which she denied the and committed the alleged acts of cruelty. On the 12th day of October, 1937, the Defendant filed his petition praying that the order of August 4, 1937, be vacated and that the Plaintiff, and that certain money paid to the Plaintiff be returned to him. This petition was referred on October 22, 1937, to the latter in chambers for hearing. On November 7, 1937, testimony was taken before the Master, pursuant to the above reference, and on November 8, 1937, the Master filed his report finding that the Plaintiff, during the pendency of this suit, is entitled to receive support and maintenance from her husband after examining the evidence concerning the condition and life of the parties and their circumstances, and further recommending that the Defendant's petition to vacate the order of August 4, 1937, be denied. Thereafter on November 11, 1937, an order was entered granting the master's report, and denying the petition of the Defendant to vacate the order of August 4, 1937. No appeal from this order was taken by the Defendant. On November 16, 1937, the Plaintiff filed a motion for a writ of habeas corpus against the Defendant for failure to pay past due alimony. The Defendant answered said motion on November 22, 1937, and he again set up in said answer the alleged defense that the order of August 4, 1937, was void as the court never had jurisdiction of the subject matter. On November 23, 1937, the Defendant filed his amended answer to the Plaintiff's motion of November 16, 1937, in which he alleges that some facts are set forth in his answer of November 22, 1937, and in addition certain alleged facts the Plaintiff committed adultery on November 14, 1937, and that therefore the Plaintiff's petition of November 16, 1937, was not filed in good faith.

3

and should be dismissed. On December 4, 1937, after a hearing before the court on the petition and answer, as amended, the court entered an order finding it had jurisdiction of the subject matter, and that the defendant's motion to dismiss on the grounds that the order of August 8, 1937, was void, should be denied. No appeal was taken from this order. On December 9, 1937, the defendant filed his amended cross-bill for divorce on the grounds of extreme and repeated cruelty and that the plaintiff had committed adultery on November 14, 1937. This cross-bill is sworn to by the defendant, and in paragraph 5 of said bill defendant alleges that the parties lived and cohabited together as husband and wife until on or about the 13th day of September, 1936. On the same day, to wit: December 9, 1937, the defendant filed his petition herein charging that the plaintiff committed adultery on November 14, 1937, and prayed that he be given an opportunity to establish said charge and that the order of August 8, 1937, be set aside. The plaintiff answered this petition denying the charge of adultery. On December 20, 1937, the plaintiff answered the defendant's amended cross-bill denying the charges of cruelty and adultery. On December 27, 1937, the plaintiff filed her petition for a rule to show cause why the defendant should not be committed to the county jail for failure to pay back alimony. An order for alimony was entered on August 8, 1937, in the plaintiff's separate maintenance suit against the defendant, directing the defendant to pay \$10.00 per week temporary alimony, and the further sum of \$50.00 on account of attorney's fees. To this petition the defendant answered on December 30, 1937, reciting that he filed a petition to vacate the order of August 8, 1937, because the plaintiff had been guilty of adultery since the filing of said complaint. Thereafter, on January 5, 1938, an order was entered in this cause referring said petition of the defendant heretofore filed on December 9, 1937, as well as the petition of the plaintiff

and should be dismissed. On November 6, 1937, after a hearing before the court on the petition and answer, as required, the court entered an order finding it had jurisdiction of the subject matter, and that the defendant's motion to dismiss on the grounds that the order of August 6, 1937, was void, should be denied. An appeal was taken from this order. On November 8, 1937, the defendant filed his amended cross-bill for divorce on the grounds of extreme and repeated cruelty and that the plaintiff had committed adultery on November 14, 1937. This cross-bill is sworn to by the defendant, and in paragraph 5 of said bill defendant alleges that the parties lived and cohabited together as husband and wife until on or about the 15th day of September, 1938. On the same day, he was divorced by the court. The defendant files his petition praying that the plaintiff committed adultery on November 14, 1937, and prays that he be given an opportunity to establish his charge and that the order of August 6, 1937, be set aside. The plaintiff answered this petition denying the charge of adultery. On December 21, 1937, the plaintiff answered the defendant's amended cross-bill denying the charges of cruelty and adultery. On December 27, 1937, the plaintiff filed her petition for a rule to show cause why the defendant should not be committed to the county jail for failure to pay back alimony. An order for alimony was entered on August 6, 1937, in the plaintiff's separate maintenance suit against the defendant, requiring the defendant to pay \$10.00 per week temporary alimony, and the plaintiff was ordered to pay \$10.00 on account of attorney's fees. To this petition the defendant answered on December 27, 1937, reciting that he filed a petition to vacate the order of August 6, 1937, because the plaintiff had been guilty of adultery since the filing of said petition. Thereafter, on January 6, 1938, an order was entered in this cause returning said petition of the defendant to the plaintiff filed on November 8, 1937, as well as the petition of the plaintiff

for an order directing that a rule to show cause be entered against the defendant for failure to pay back alimony, and the answers to the petitions to a Master in Chancery to take evidence and report same to the court.

Various hearings were had before the Master in Chancery, beginning January 14, 1938, and ending May 17, 1938. Thereafter the Master filed his report on January 13, 1939. In and by said report the Master found that the court had jurisdiction of the parties and the subject matter; that from a consideration of all the evidence so adduced by the various parties, the Master found that there was not sufficient evidence in the record to warrant a finding that the plaintiff was guilty of the acts complained of in said petition, but that on the contrary the evidence preponderated in favor of the plaintiff. The Master recommended that the defendant's petition be denied, and that a rule be entered upon the defendant to show cause why he should not be punished for contempt of court for failure to comply with the order entered on August 6, 1937. Thereafter the defendant filed objections to the Master's report and argued the same before the Master. His objections were overruled. Thereafter an order was entered that the objections stand as exceptions, and on January 13, 1939, the exceptions to the Master's report were overruled and the petition of the defendant was denied and a rule entered against the defendant to show cause why he should not be punished for contempt of court for failure to comply with the order entered on August 6, 1937.

On January 27, 1939, an order was entered finding that there was then due for temporary alimony \$600, and the further sum of \$25.00 on account of temporary solicitors' fees; and that the defendant was guilty of contempt of court, and that he be committed to the county jail, until he paid the sum of \$625.00, and that a

the petitioners for relief to pay back money, and the petitioners for a waiver in January to take evidence and report on the same.

[illegible]

by the Special Agent in Charge of the Bureau of Investigation, and that a note be entered upon the statement as above signed, and that the statement be returned to the Bureau of Investigation. The Bureau recommended that the statement be returned to the Bureau of Investigation, and that the statement be returned to the Bureau of Investigation.

on January 12, 1955, the exceptions to the general rule were overruled and the position of the defendant was denied and a rule

entered against the defendant in those cases why he should not be punished for removal of money for failure to comply with the order.

On January 17, 1967, the following was received from the Bureau of Prisons, Washington, D.C.:

5

warrant for such commitment be issued forthwith. On the same day a further order was entered fixing the Master's fees in this cause at \$167.70, which sum was taxed as costs against the defendant, and the defendant was ordered to pay said sum to the Master in Chancery. It is from these two orders that the defendant appeals.

It is contended by the defendant that the order entered on the 6th day of August, 1937, by which the defendant was directed to pay to the plaintiff \$10.00 per week, was null and void, because the court was without jurisdiction to enter such an order. The complaint for separate maintenance which was filed by the plaintiff on the 3rd day of August, 1937, was insufficient to confer jurisdiction upon the court, because no affirmative allegation was made therein that the plaintiff was living separate and apart from the defendant at the time when the complaint for separate maintenance was filed. The plaintiff, however, calls attention to the fact that counsel for the defendant, prior to this appeal, questioned the validity of the order of August 6, 1937, on two separate and distinct times but never appealed from either ruling. The first occasion was the ruling by Master Dehan on November 9, 1937, that the order of August 6, 1937, was valid. The second was the hearing before the court on December 4, 1937, at which time the court again held the order of August 6, 1937, was a valid order. On each occasion the defendant did not appeal from said orders of November 9, 1937, and December 4, 1937, and the defendant is now estopped to question the order of August 6, 1937, as it is not an issue on this appeal.

It is true, however, that on October 13, 1937, the defendant filed his cross-bill, alleging under oath that he and the plaintiff lived and cohabited together as husband and wife until September 13, 1936; again on December 9, 1937, he filed his amended cross-bill, alleging under oath that they lived and cohabited together as husband and wife until September 13, 1936. The cross-bill, as well as the

The first of these is the fact that the defendant was not present at the trial of the first case. The second is the fact that the defendant was not present at the trial of the second case. The third is the fact that the defendant was not present at the trial of the third case. The fourth is the fact that the defendant was not present at the trial of the fourth case. The fifth is the fact that the defendant was not present at the trial of the fifth case. The sixth is the fact that the defendant was not present at the trial of the sixth case. The seventh is the fact that the defendant was not present at the trial of the seventh case. The eighth is the fact that the defendant was not present at the trial of the eighth case. The ninth is the fact that the defendant was not present at the trial of the ninth case. The tenth is the fact that the defendant was not present at the trial of the tenth case.

amended cross-bill, was verified by this defendant, and the plaintiff contends that it now comes too late for the defendant to deny these sworn allegations; that a fact admitted by the defendant under oath needs no further proof, and cites in support of this contention the case of Paul v. Paul, 301 Ill. App. 595, where the court said:

"The sworn bill of appellant averring the marriage, the answer of appellee admitting such marriage, the cross-bill of appellee again averring the marriage, were, we think, sufficient proof to warrant the chancellor in holding that the relation of husband and wife between the parties was proven."

It appears from what we have already stated in our opinion that the defendant by his pleadings has admitted that he and his wife were living separate and apart on September 13, 1936, so that the only question of fact involved in this matter is whether they were living separate and apart on August 8, 1937, and the defendant having admitted that on September 13, 1936, they were, he is not in a position to complain.

The next question that we consider material on this issue is whether by the evidence the plaintiff was guilty of adultery, as charged by the defendant in his petition, and whether the findings of the master who saw and heard the witnesses were against the manifest weight of the evidence.

In discussing this question we are impressed from reading the evidence as suggested by the parties that there is a controversy upon the question of fact. It was for the master who saw and heard the witnesses to determine the facts as they were presented to him and to present his report to the court, who subsequently approved the report and denied the motion of the defendant.

The facts as suggested are that the defendant with his witnesses went to the building on the northwest corner of Lowell Avenue and Cornelia Street, known as 3800 N. Lowell Avenue, occupied by Louis Merwy. The evidence as they presented it is that Louis

Hervey resided alone in the second apartment of the two story frame building located on said northeast corner. The front entrance to the building faces Lowell Avenue, and there was a rear entrance; that about 35 minutes to twelve on the evening of November 14, 1937, the automobile which was owned by Hervey came driving from the east to the west and stopped at the rear entrance of the building; that the plaintiff was in the automobile with him; that when the automobile stopped at the rear entrance the plaintiff got out of the automobile and entered the rear entrance, which was an enclosed stairway, and was seen in a few minutes to enter said second apartment and turn on the lights in the same, and Hervey after she had alighted from the automobile, drove the automobile into a garage in the rear of the lot upon which the building was located, and finally entered the apartment in which the plaintiff had gone a few moments before. There was a bedroom adjoining the living room in said apartment occupied by Louis Hervey, and immediately to the north of said living room; that the plaintiff went into the bedroom, and then came out into a kitchen and walked back and forth from the bedroom to the kitchen and the living room, two or three times; and that the last time she came out of the bedroom she was dressed in a nightgown; that after Hervey came into the apartment he went into the living room, in which a light was burning and the window curtains were about half way down; that he could be seen by the witnesses taking off his coat and vest and trousers in the living room; that Hervey afterwards entered the bedroom into which the plaintiff had gone shortly before and that the lights were then turned off.

The defendant and two of his witnesses testified that they went to the rear door of Hervey's apartment a few minutes after Hervey had been seen to go into the bedroom with the plaintiff and that they knocked upon said rear door; that Hervey came to the door after

Harry testified alone in the second apartment of the two-story house at 1117 West 12th Street, Seattle, Wash., on the evening of November 14, 1937, that about 25 minutes to twelve on the evening of November 14, 1937, the automobile which was owned by Harry came driving from the east to the west and stopped at the rear entrance of the building; that the plaintiff was in the automobile with him; that when the automobile stopped at the rear entrance the plaintiff got out of the automobile and entered the rear entrance, which was an enclosed alleyway, and was seen in a few minutes to enter said second apartment and turn on the lights in the same, and Harry after she had alighted from the automobile, gave the automobile into a garage in the rear of the lot upon which the building was located, and timely entered the apartment in which the plaintiff had gone a few moments before. There was a bedroom adjoining the living room in said apartment occupied by Louis Harry, and immediately to the south of said living room; that the plaintiff went into the bedroom, and then came out into a kitchen and walked back and forth from the kitchen to the living room and the living room, two or three times; and that the last time she came out of the bedroom she was dressed in a nightgown; that after Harry came into the apartment he went into the living room, in which a light was burning and the window shades were about half way down; that he could be seen by the witnesses taking off his coat and vest and throwing in the living room; that Harry afterwards entered the bedroom into which the plaintiff had gone shortly before that time the lights were first turned off.

The defendant and two of his witnesses testified that Harry went to the rear door of Harry's apartment a few minutes after Harry had gone down to go into the bedroom with the plaintiff and that they finished when said Harry came; that Harry came to the door after

some minutes, and demanded to know what they wanted; that the witness Young then stated that they demanded that he "deliver over Mrs. Kurz"; that Herwy replied: "You are not smart enough to catch us". Herwy did testify as a witness that said parties did knock on the rear door, as they claimed they did and that he went to said rear door, but stated that instead of demanding that the plaintiff be delivered over to them that Young stated: "How would you like to have your head blown off?" and that he replied that he was, "just as hard-boiled as Young was"; and that Young went away; that thereupon Kurz sent for the police, and the police officer Dejeski, testified that on the night of November 14, 1937, he recalled that he was called to the premises at 3500 N. Lowell Avenue; that he received a radio-gram to meet the plaintiff in front of 3500 N. Lowell Avenue; that when he and the other officers arrived they found a gentleman on the corner; that he came over to them while they were in the car and told them that his wife was in the flat with another man in the corner building; that he, the witness, asked him what it was all about, and he said that his wife was going out with this fellow, and that this time she was in the flat, and he wanted him to go in there, search the house and make an arrest. The officer told him that as far as an arrest was concerned, the whole matter was a family affair - not a police matter - and that he had no business to go into the house. Shortly thereafter Mr. Herwy came out on the porch and asked what it was all about; that the officer went up to the porch on the second floor, and that Herwy said to him: "Come in here officer, if you think she is in here"; that Herwy, "asked me to search the home"; that he replied to Herwy: "No, as far as searching the house, we have no business here," and the witnesses called by the defendant testified to the facts as they occurred at the time. Upon the trial of this issue, the plaintiff denied that she was in the apartment with Mr. Herwy, but that she was at the time with one Mrs. Hauser, 3847 Dickens

some minutes, and demanded to know what they wanted; that the witness
Young then stated that they demanded that he "deliver over Mrs. Kury";
that Harry replied: "You are not smart enough to catch me"; Harry
did testify as a witness that he called his house on the next
day, as they claimed they did and that he went to said rear door,
and stated that instead of demanding that the plaintiff be delivered
over to them that Young stated: "How would you like to have your
head blown off?" and that he replied that he did not want to be
blown off; and that Young went away; that the witness then
went for the police, and the police officer, testified that
on the night of November 14, 1937, he testified that he was called
to the premises at 2300 N. Lowell Avenue; that he received a radio-
gram to meet the plaintiff in front of 2300 N. Lowell Avenue; that
when he and the other officers arrived they found a gentleman on the
corner; that he came over to them while they were in the car and told
them that his wife was in the rear passenger seat in the corner
building; that he, the witness, asked him what it was all about, and
he said that his wife was going out with this fellow, and that this
fellow was in the back, and he wanted him to go in there, section the
house and make an arrest. The witness told him that he did not
want to get concerned, the whole matter was a family affair - not a
police matter - and that he had no business to go into the house.
The witness testified that Harry came out in the front and asked what
it was all about; that the witness went up to the house on the corner
floor, and that Harry said to him: "Come in here officer, if you
think she is in here"; that Harry, "asked me to search the house"; that
he replied to Harry: "No, as far as searching the house, we have no
business here," and the witnesses called by the defendant testified
to the fact as they occurred at the time. Upon the trial of this
cause, the plaintiff testified that she was in the apartment with Mr.
Harry, and that she was at the time with Mrs. Bennett, 2349 Jackson

Street, Chicago, Illinois, on the night of November 14, 1937, in fact from November 11, 1937, until November 30, 1937, during which time Mrs. Hauser was recovering from an operation; that Mrs. Hauser was operated upon for goiter on November 8, 1937, and returned from the hospital to her home on November 11, 1937, and the plaintiff acted as her practical nurse, sleeping in her home, and in Mrs. Hauser's own bed every night during that time, and was in her home during all that period of time both day and night; that during the nights of November 8, 1937 to November 30, 1937, she slept in the same bed with Mrs. Hauser and gave her medicine every hour during the entire evening. This evidence was corroborated by the plaintiff and the plaintiff's witnesses, Mr. Hervey, Mr. Dejeski and Mrs. Schellenberger, and after an examination of the facts as we have outlined them, it is apparent that the question was a controverted one upon which the Master in Chancery made his report and presented it to the court, and the plaintiff cites in support of her contention the case of Berg v. Berg, 119 Ill. App. 423, where this court said:

"In Stewartson v. Stewartson, 15 Ill. 145, the court say, in regard to an objection to the allowance of alimony; 'Before we should feel justified in disturbing a decree of this kind, we ought to be able to say that manifest injustice has been done. The conduct of the parties may very properly be taken into consideration, upon the question of alimony. That is not before us as it was presented to the Circuit Court upon the hearing of the case for divorce, so that, to that extent at least, the Circuit Court had more facilities for judging of the respective merits of the parties than we have. In cases where the circumstances may justify a divorce under our statute, there may be widely different degrees of merit on the one side, and censure on the other, which should very properly be considered in determining the question of alimony, quite independent of the pecuniary circumstances of the parties. Hence the decision of the Circuit Court is entitled to every reasonable intendment in its favor.'"

So, it would seem that the report of the master was approved and the motion of the defendant to set aside the order entered on August 6, 1937, was denied, and there is nothing here which would justify a reversal of the conclusion of the court.

The question of the charge of adultery is still an open

one, and it will be for the court to pass upon the evidence to be heard upon the charges alleged in the pleadings to determine the merits of the controversy.

Another question that we may consider is whether the order of the court allowing fees to the master was a proper one. By statute a master is entitled to charge a fee not to exceed \$10.00 per day for each day necessarily consumed in conducting and reporting the result of his investigation. Ch. 40, Section 15 of the Divorce Act provides in part as follows:

" * * * no order or decree for alimony shall be entered until the court or a master in chancery or special commissioner to whom the court may refer the cause shall have determined from evidence the condition and life of the parties in their circumstances, in case such cause is referred to a master or commissioner, the court may allow such master or commissioner a fee not to exceed \$10.00 per day for each day necessarily consumed in conducting and reporting the results of said investigation."

The fee allowed by the court was for the six days time which the master in chancery certified he necessarily consumed in conducting the hearings upon the matter and reporting his conclusions, and seems to be fairly within the statutory provision. The question in controversy is to the taking of 359 pages of testimony containing 700 portfolios at 15 cents per 100 words, amounting to \$107.70. The master certified that subsequent to the order of reference in this cause, from time to time during the period said matter was pending before him he caused notices in writing of hearings to be had in connection therewith to be sent to the attorneys of record in said cause, that said hearings were set and written notices thereof prepared and sent out for the following dates, to-wit: January 14, 1938, January 19, 1938, March 21, 1938, March 28, 1938, April 6, 1938, April 11, 1938, April 18, 1938, May 3, 1938, May 10, 1938, May 17, 1938; that upon the hearings 359 pages of testimony were taken, to which he devoted five days; that upon proofs being closed he examined the record and made an examination of the law with respect thereto.

one, and it will be for the court to see that the evidence to be heard upon the charges alleged in the affidavits to determine the merits of the controversy.

Another question that we may consider is whether the order

of the court allowing fees to the master was a proper one. By

stating a master is entitled to charge a fee not in excess of \$10.00

per day for each day necessarily consumed in conducting and reporting

the results of his investigation. Ch. 48, Section 15 of the divorce

act provides in part as follows:

" * * * no order or decree for alimony shall be entered until the court or a master in conformity with special commission to whom the facts may refer the cause shall have taken evidence from the commission and filed at the office in their own statement, in such cases is referred to a master or commissioner, the court may also order an examination to be made and entered \$10.00 per day for each day necessarily consumed in conducting and reporting the results of said investigation."

The fee allowed by the court was for the six days which

the master is obviously entitled to necessarily consumed in conducting

the hearings upon the matter and reporting his conclusions, and seems

to be fairly within the statutory provision. The commission is entitled

every day to the filing of \$25 pages of testimony containing 100

pages of 100 words, amounting to \$10.00 per day.

Master testified that reference to the books of reference in this

case, from time to time during the period said matter was pending

before him he caused notices to be sent to the attorneys of record in said

connection therewith to be sent to the attorneys of record in said

case, that said notices were not and copies were received

therein and sent out for the following dates, to-wit: January 14,

1932, January 15, 1932, March 12, 1932, March 22, 1932, April 1, 1932,

April 11, 1932, April 12, 1932, May 2, 1932, May 12, 1932, May 14,

1932; and upon the hearing his pages of testimony were taken, to

which he caused this copy; that upon these dates should be examined

the record and made an examination of the law with respect thereto.

The master's report was rendered on August 9, 1939, and the respective parties were given until August 15, 1939, to file objections thereto; objections were filed, which were allowed to stand as exceptions. The court overruled these exceptions and entered the order which is the subject of this appeal.

The courts have passed upon this question of whether the charge made by the master is a proper one, and the defendant contends that a master can make a charge for taking testimony only when he has taken the same, and that when such testimony is taken by the parties themselves there is no basis or warrant in law for the master to make a charge for taking something that was taken by someone else.

The Supreme Court considered a like question in the case of Ward v. Glendinning, 345 Ill. 306, and said in part:

"The allowance by the court to the master of fifteen cents per hundred words for taking and reporting the testimony as a part of his fees is assigned as error, the contention being that the master is not entitled to this allowance for the reason that the testimony was taken down and transcribed by a stenographer who was employed and paid by one of the parties and not by the master. This question was raised in Moore v. Fitzgerald, 204 Ill. 335, and the facts here are identical with the facts in that case. The order of the court as to costs was proper."

Turning to the case of Moore v. Fitzgerald, 204 Ill. 335, just referred to and in which the same question was passed upon by the Supreme Court, we quote the following:

"An objection is made to the allowance of fees to the master. The court allowed to the master the statutory fees for taking testimony. It appears that by agreement the parties employed a stenographer and paid him fifty cents a page for reporting the testimony. Thus the master was saved the labor of writing out the testimony. No portion of the fifty cents per page was received in any way by the master. Notwithstanding that the master did not have to write down the testimony, he had to listen to it, examine and certify to the correctness of every word transcribed by the stenographer or change the same to correspond with the actual testimony. That done by the parties was not at the master's request, and was doubtless a great saving to the parties in the way of time and solicitor's fees."

See also Ruddy v. McDonald, 344 Ill. 494.

For the reasons stated the orders entered by the court on January 27, 1938, finding the defendant guilty of contempt of court and directing that he be committed to the County Jail of Cook County, Illinois, there to remain charged with said contempt of this court until he pay the said sum of \$325.00 into this court for the use of the plaintiff, unless released by due process of law; and further ordering that the sum of \$127.70 be taxed as costs against the defendant, and that the defendant pay the said sum to Master Denis E. Sullivan, Jr., are affirmed.

ORDERS AFFIRMED.

BURKE, J. CONCURS.

DENIS E. SULLIVAN, P.J. TOOK NO PART.

See also Exhibit V. Appendix, Vol. III, 1961.

For the reasons stated the court entered its order on January 27, 1962, finding the defendant guilty of conspiracy to count and abstracting that he be committed to the County Jail of Cook County, Illinois, where he remain charged with said conspiracy. At this court will be pay the cost of \$100.00 less this court for the use of the plaintiff, unless released by the payment of cash; and further ordering that the sum of \$100.00 be taxed as costs against the defendant, and that the defendant pay the said sum to Master Denis E. Sullivan, Jr., the plaintiff.

CHIEF JUSTICE

WILLIAM J. COUGHLIN

WILLIAM J. COUGHLIN, JUDGE OF THE COURT

40749

OSCAR P. RUBARDT, GEORGE HENCKHUS and
ROBERT MAYS,

(Plaintiffs) Appellees,

v.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

STEFAN LEWANDOWSKI, GENEVIEVE LEWANDOWSKI,
FRANK C. HEDBALE, ARTHUR LARSON, L. D.
SMITH, James J. Larson, "Unknown Owners",
First National Bank of Chicago, a
Corporation, as Successor Trustee under
Trust Deed dated June 18, 1930, and recorded
as Document No. 10666413 and NORTHWEST READY
ROOFING COMPANY,

Defendants.

302 I.A. 622

On Appeal of

STEFAN LEWANDOWSKI and GENEVIEVE LEWANDOWSKI,

(Defendants) Appellants.

MR. JUSTICE HENEL DELIVERED THE OPINION OF THE COURT.

This is an appeal by the defendants Stefan Lewandowski and Genevieve Lewandowski, makers of certain notes secured by trust deed, from a foreclosure decree in the proceeding to foreclose the trust deed for the defendants' defaults.

On September 7, 1930, Oscar P. Rubardt, a holder of one of a series of notes executed by the defendants, Stefan and Genevieve Lewandowski, being a total of \$13,400, and secured by trust deed on certain real estate in Chicago, Illinois, filed his complaint to foreclose the trust deed given by these defendants to secure the payment of the certain notes, in which he alleged that the defendants had applied in the Federal Court for an extension of the indebtedness under said mortgage; that the application had been granted and the payments thereon extended, but that the defendants had made default in the payment of the promissory notes and in failing to pay general taxes on the property in the sum of \$1,323.06, and were in default therefor. Upon application to the Federal Court an order was allowed granting leave to file a foreclosure proceeding.

The defendants made their motion to strike the complaint in which they alleged that the plaintiffs did not have the legal capacity to bring a representative action and that the right to foreclose the trust deed was in the trustee. This motion was overruled by the court and thereupon the defendants answered admitting the execution of the trust deed and the notes but denying that the plaintiffs were the proper parties to proceed to foreclosure of the trust deed for such default.

The matter was referred to a Master in Chancery, who found that the plaintiffs had a right to foreclose the lien of the trust deed, and recommended that a decree be entered and further finding that the attorneys for the plaintiffs were entitled to a fee of \$1,350. for services rendered in the foreclosure proceeding. Objections were filed to the master's report by the defendants, first to the finding that the plaintiffs had the right to maintain the action, and secondly to the finding allowing the plaintiffs a solicitor's fee of \$1,350. for services rendered in foreclosing the trust indenture. These objections were overruled by the master, who then amended his report, reducing the attorneys' fees to \$1,100. The objections were ordered to stand as exceptions, and the exceptions were overruled by the court and a decree of foreclosure was entered, in which, among other things, the attorneys' fees were found to be a lien in the sum of \$1,100. and the property directed to be sold for the satisfaction of the indebtedness as found due under the decree, in the amount of \$18,888.37, together with the costs of the proceeding.

It appears from the brief filed on behalf of the three plaintiffs, that Oscar F. Subardt was the owner of Note No. 3 for \$5,000; George Menckhus, owner of Note No. 4 for \$1,000; and Robert Mays, owner of Note No. 7 for \$4,000; that the brief was

The defendant was held liable to answer the complaint in which they alleged that the plaintiff did not have the legal capacity to bring a representative action and that the right to foreclose the trust deed was in the plaintiff. This action was brought by the trust and defendant for recovery of the principal and interest on the trust deed and the notes and bonds which the plaintiff were the proper parties to proceed to foreclose of the trust deed for each default.

The matter was referred to a master in chancery, who found that the plaintiff had a right to foreclose the lien of the trust deed, and recommended that a decree be entered and further finding that the attorneys for the plaintiff were entitled to a fee of \$1,200, for services rendered in the foreclosure proceedings. Objections were filed to the master's report by the defendant, first to the finding that the plaintiff had the right to foreclose the lien, and secondly to the finding allowing the plaintiff's attorney's fee of \$1,200. For services rendered in foreclosing the trust deed. These objections were overruled by the master, and the master's report, including the attorney's fee of \$1,200.

The objection was effective as to the amount of the fee, and was sustained by the court and a decree of foreclosure was entered, in which, among other things, the attorney's fees were found to be a lien in the sum of \$1,200, and the property directed to be sold for the satisfaction of the indebtedness as found due under the decree, in the amount of \$11,000.00, together with the costs of the proceedings.

It appears from the bill filed on behalf of the three plaintiffs that Oscar E. Roberts was the owner of Note No. 8 for \$1,000; Joseph Hamilton, owner of Note No. 9 for \$1,000; and Robert Ross, owner of Note No. 10 for \$1,000; that the bill was

filed on behalf of all the remaining note holders, to-wit: Arthur Larson, owner of Note No. 2 for \$500; L. D. Smith, owner of Note No. 3 for \$500; James J. Gleason, owner of Note No. 6 for \$1,000; Frank G. Niedbale, owner of Note No. 1 for \$500, of which \$100 has been paid; Steven Brooks, owner of Note No. 5 for \$1,000, making the total sum of these certain notes \$13,400, which is the principal amount of the indebtedness involved; and that all note-holders, whether plaintiff or defendant, join in asking an affirmance of the decree appealed from by the defendants Stefan Lewandowski and Genevieve Lewandowski, the owners of the real estate in question.

The first question called to the attention of this court on behalf of the defendant Stefan Lewandowski is that there is no provision for the foreclosure by the bondholders on the ground that the original bill of complaint in the instant case was filed by an individual bondholder on behalf of all the bondholders, and the remaining bondholders were made parties defendant as "Unknown Owners."

The answer of the plaintiffs to this contention is that the question of whether or not the action was brought by the plaintiffs in a representative capacity was not at issue in the trial court, and the action was not in fact a representative action in the true sense of the word. It might be said in passing that all the noteholders involved in the litigation filed their appearances and, as we have indicated, asked for an affirmance of the decree appealed from. The plaintiffs' reply to this suggestion by the defendants that the suit is a representative one is that the question of the suit being a representative one is now being raised for the first time; that while the plaintiff alleged that he filed "this his bill of complaint to foreclose the lien of the said trust deed for and on behalf of himself and all other holders or owners of notes

Filed on behalf of all the remaining note holders, to-wit: Arthur
Lynch, owner of Note No. 2 for \$200; A. G. Smith, owner of Note
No. 3 for \$200; James J. Harrison, owner of Note No. 4 for \$1,000;
Frank O. Nisbake, owner of Note No. 1 for \$200, of which \$100
has been paid; seven others, owner of Note No. 5 for \$1,000, making
the total sum of these certain notes \$18,400, which is the
principal amount of the indebtedness involved; and that all note-
holders, whether plaintiff or defendant, join in asking an
affirmance of the decree appealed from by the defendants Stefan
Lewandowski and Genevieve Lewandowski, the owners of the real
estate in question.

The first question called to the attention of this court
as a result of the testimony of Stefan Lewandowski is that there is no
provision for the enforcement by the bondholders on the ground that
the original bill of complaint in the instant case was filed by an
individual bondholder on behalf of all the bondholders, and the
remaining bondholders were made parties defendant as "Unknown Owners."

The answer of the plaintiffs to this contention is that
the question of whether or not the action was brought by the plain-
tiffs in a representative capacity was not at issue in the trial
court, and the action was not in fact a representative action in
the true sense of the word. It might be said in passing that all
the noteholders involved in the litigation filed their appearance
and, as we have indicated, asked for an affirmance of the decree
appealed from. The plaintiffs reply to this suggestion by the
defendants that the suit is a representative one in that the question
of the suit being a representative one is now being raised for the
first time; that while the plaintiff alleged that he filed "this
bill of complaint to foreclose the lien of the said first deed
for and on behalf of himself and all other holders or owners of notes

secured by the trust deed sought to be foreclosed", the other noteholders were made parties defendant as unknown owners as stated in defendants' brief. Obviously, they contend, if the plaintiff contended that he could or did represent the other noteholders it would not have been necessary to serve the other noteholders by publication, and the expense and delay incident to such publication could have been avoided. Actually, the plaintiffs were foreclosing because all the other notes were past due both as to principal and interest, and there was a default as to the payment of taxes. The basis of the foreclosure was not simply because of tax default, as stated, but because of a long continued default on principal and interest of all notes involved.

All of the noteholders, except Frank C. Niedbale, owner of the \$500 note, and Steven Brooks, owner of a \$1,000 note, filed appearances in the trial court, either as plaintiffs or defendants, and as stated, the plaintiffs contend that all the noteholders, including Frank C. Niedbale and Steven Brooks, join in asking an affirmance of the decree of foreclosure.

In Futerbaugh on Chancery Pleadings and Practice, Vol. 1, at page 850, the text says:

"The legal holder and owner of notes secured by a trust deed may file a bill in his own name, making the trustee a defendant, notwithstanding the deed provides that the grantee or his successor in trust may enter and file a bill in his own name and obtain a decree of sale. (Citing Dorn v. Colt, 180 Ill. 397; Cheltenham v. Whitehead, 138 Ill. 279)."

And in the opinion of the Illinois Supreme Court in Dorn v. Colt, 180 Ill. 397, the court said:

"In the Superior Court of Cook County appellee, Colt, obtained a decree foreclosing a deed of trust as a mortgage, and for the sale of the property. On Dorn's appeal the Appellate Court affirmed the decree. On this his further appeal Dorn insists that appellee had no right to file the bill in her own name, but that it should have been brought by the trustee.

Appellee was the legal holder and owner of the notes secured by the deed of trust and was the proper party complainant. The trustee was made a defendant. The mere fact that the deed of trust provided that in case of default in payment it should be "lawful for the grantee or his successor in trust to enter, * * * and in his own name, or otherwise, to file a bill in any court of competent jurisdiction to obtain a decree of sale," etc., did not deprive appellee of her right to file the bill in her own name. (Cheltenham Improvement Co. v. Whitehead, 128 Ill. 279.)"

It is to be noted in the instant case that all the note owners are made parties to the litigation, as well as the successor in trust, who was served by a process and defaulted and it would seem from all the facts and circumstances as they appear, that there was no objection to the procedure by the plaintiffs; in fact the question of the suit being a representative one was raised for the first time in this court, and the rule is that a question which is not raised in the trial court by the parties to the proceeding is waived and they are not in a position to call to this court's attention a question which should have been properly before the trial court. However, upon the question of the right to foreclose this court said in Reliance State Bank v. Finook, 232 Ill. App. 610, where there was a partial foreclosure by a noteholder who held four of the 88 bonds:

"We find nothing in the trust deed that can reasonably be said to limit or restrict the right to a partial foreclosure. The fact that it provides for one by holders of interest coupons alone - a right they had without that express provision - cannot reasonably be construed to deprive the holders of matured bonds, or bonds and interest coupons - as to which on this question no distinction need be made - from exercising a right that exists without any express provisions in the trust deed therefor."

As we have indicated, our Supreme Court has held that it is proper for the legal holder and owner of interest notes secured by a trust deed to file a foreclosure proceeding, notwithstanding a provision in the trust deed that the grantee, meaning the trustee or his successor, may file the bill in his own name. Then again,

6

the legal holder and owner of a part of the indebtedness secured by the trust deed may file a bill for a partial foreclosure of the securities which became due and payable.

In a further discussion of this matter, the defendants Lewandowski call our attention to the provision of the trust deed, the subject of this foreclosure proceeding, which provides:

"The grantors further covenant and agree that in the event of default in making payment of any of said interest notes or of any installment of principal due, in accordance with the terms of said note, or in the event of default in payment of any advances made by the trustee or the holder of the indebtedness secured hereby, in accordance with the terms hereof, then the trustee or the legal holder of said note or notes so in default may immediately foreclose the lien of this trust deed by appropriate bill in chancery without declaring the whole amount of the indebtedness hereby secured immediately due; and after such foreclosure this trust deed shall continue to be a good and valid lien upon the premises aforesaid as security for the balance of said principal sum and any interest thereon due or to become due and this right to partial foreclosure shall be continuous as often as defaults may occur."

So it is to be noted that by this very provision the legal holder of said note or notes so in default may immediately foreclose the lien of the trust deed. In the instant case this is exactly what the plaintiffs did, in which they were joined by some of the other noteholders, and that was, to foreclose a mortgage, for the reason that all the notes were in default. There is nothing in this provision that prohibits such a practice. If the plaintiffs on behalf of themselves and other noteholders had, as we interpret this provision, the right to foreclose on notes in default, and having done so, in this action it was not necessary that the trustee institute such action, and there was no error by the court in entering a decree such as was entered in this proceeding. This theory is not in violation of the further provision cited by these defendants, which provides:

"In case of * * * or of a breach of any of the covenants or agreements herein contained * * * on the application of the legal holder or holders of said promissory notes

the legal holder and owner of a note of the indebtedness referred to by the bank need not file a bill for a judicial foreclosure of the securities which become due and payable.

In a further discussion of this matter, the following observations will not be attended to the provisions of the bank note.

The subject of this discussion is, "The provisions of the bank note."

The provisions further govern and state that in the event of default in making payment of any of said interest or principal, or in the event of default in the payment of any advance made by the bank to the holder of the indebtedness secured hereby, in accordance with the terms of the bank note, the legal holder of said note at the time of such default may immediately foreclose the lien of the bank note by appointment of a receiver without delay, and the receiver of the indebtedness hereby secured immediately shall take possession of the property of the bank note, and shall sell the same for the purpose of satisfying the debt secured by the bank note, and the proceeds of such sale shall be applied to the payment of the debt secured by the bank note, and the balance of said proceeds shall be paid to the holder of the bank note, and this right to foreclose shall be continuous as often as default is made.

It is to be noted that by this very provision the legal holder of

said note or notes so in default may immediately foreclose the lien of the bank note, in the instant case this is exactly what the plaintiff's bill, in which they were joined by some of the other defendants, and that was, to foreclose a mortgage, for the reason that all the notes were in default. There is nothing in this provision that prohibits such a provision. It is the plaintiff's on behalf

of themselves and their children and, as an independent provision, the right to foreclose as stated in the bank note, does not, in this action it was not necessary that the provision institute such action, and there was no error by the court in entering a decree as was stated in the bank note. This decree is not in violation of the further provision stated by these

defendants, which provides:

"In case of a breach of any of the provisions of agreement herein contained, the legal holder of said promissory notes

or either of them, it shall be lawful for the grantee and trustee herein, or his successor in trust, as the case may be * * * and in its own name or otherwise, to file a bill or bills in any court having jurisdiction thereof for the foreclosure of this trust deed."

This provision from its contents as we have quoted it seems to be a contradiction of the other provision from which we have quoted, yet we believe that the language is not contradictory when we come to study the words, for it is provided that where there is a breach of covenant, on the application of the legal holder of notes it shall be lawful for the grantee and trustee, or his successor in trust, to file a bill in any court having jurisdiction for the foreclosure of the trust deed. We believe, therefore, that under the facts as we have outlined them, as well as the authorities and the provisions of the trust deed quoted, the court was justified in entering the decree of foreclosure.

Another question for consideration is whether the plaintiffs are entitled to the allowance of attorneys' fees for the foreclosure of the trust deed. The defendants believe that the following provision of the trust deed does not provide for the allowance of attorneys' fees to the plaintiffs for the reason that the provision is - as quoted by these defendants -

"All expenses and disbursements paid or incurred by said grantee herein (trustee) or the owner or owners of any part of the principal indebtedness secured hereby in connection with any foreclosure hereof, as aforesaid, including its reasonable solicitors' fees * * * and the appearance fees of defendants not served with process, shall be so much additional indebtedness secured hereby and shall, with all other indebtedness secured by this deed * * * be included in any decree entered in such foreclosure proceedings."

As we have indicated the plaintiffs were proper parties to institute the foreclosure proceedings, and being the owners, together with all the other noteholders of the principal indebtedness secured under the language used in this provision, are entitled to their reasonable solicitor's fees, although comment is made by the

1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific requirements of the task.

defendants that the word "its" means the trustee.

These defendants suggest that the provision in the trust deed to the effect that the grantors shall pay all costs and attorneys' fees paid or incurred by the trustee or the holder of the indebtedness in any suit in which either of them shall be plaintiff or defendant by reason of being a party thereto, etc., must of necessity refer to other suits than foreclosures of the indenture in view of the provision which provides for the payment of fees upon a foreclosure. We are unable to agree with the suggestion of the defendants, because the defendants in this action are certainly subject to the payment of the solicitors' fees in the foreclosure of the trust deed, which we held was a proper proceeding, and therefore being an indebtedness which accrued in connection with the foreclosure the plaintiffs are entitled to their reasonable solicitors' fees.

In the case of Cheltenham Improvement Co. v. Whithead, 138 Ill. 379, upon the question we are considering, the court said:

"As heretofore stated, the trust deed provides, in case of default in the payment of the debt, or in case of the breach of any of the covenants, of the deed, the party of the second part (the trustee named in the deed) is authorized, in his own name or otherwise, to file a bill to foreclose the mortgaged premises and to obtain a decree of sale, and from the proceeds of the sale the deed provides that five per cent of the amount of the debt shall be paid as solicitors' fees."

The question was raised in the instant case that the bill was filed in the name of the holder of the mortgage indebtedness and not in the name of the trustee, and therefore the plaintiffs were not entitled to solicitors' fees for services rendered in the foreclosure of the trust deed. The court in the Cheltenham case further said:

Y-HPLC-MSD with column "ODS" 3µm with field strength

"The object in providing for attorneys' fees in the trust deed was, in the event that the mortgagor should fail to pay the debt, and the holder of the indebtedness should be compelled to foreclose the trust deed in order to collect the debt, then solicitors' fees should be allowed. What difference could it make with the mortgagor whether the bill should be filed in the name of the trustee or in the name of the holder of the indebtedness? We do not see that the liability of the mortgagor could in any manner be changed, whether the bill was brought in the one name or the other."

We are of the opinion that there was no error such as would affect the foreclosure decree entered by the court; therefore the decree is affirmed.

DECREE AFFIRMED.

DENIS E. SULLIVAN, P.J. AND BURKE, J. CONCUR.

[illegible]

we are of the opinion that there is no error such as would affect the Government's desire entered by the court; therefore

1997, 1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097, 2098, 2099, 2100, 2101, 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2118, 2119, 2120, 2121, 2122, 2123, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138, 2139, 2140, 2141, 2142, 2143, 2144, 2145, 2146, 2147, 2148, 2149, 2150, 2151, 2152, 2153, 2154, 2155, 2156, 2157, 2158, 2159, 2160, 2161, 2162, 2163, 2164, 2165, 2166, 2167, 2168, 2169, 2170, 2171, 2172, 2173, 2174, 2175, 2176, 2177, 2178, 2179, 2180, 2181, 2182, 2183, 2184, 2185, 2186, 2187, 2188, 2189, 2190, 2191, 2192, 2193, 2194, 2195, 2196, 2197, 2198, 2199, 2200, 2201, 2202, 2203, 2204, 2205, 2206, 2207, 2208, 2209, 2210, 2211, 2212, 2213, 2214, 2215, 2216, 2217, 2218, 2219, 2220, 2221, 2222, 2223, 2224, 2225, 2226, 2227, 2228, 2229, 2230, 2231, 2232, 2233, 2234, 2235, 2236, 2237, 2238, 2239, 2240, 2241, 2242, 2243, 2244, 2245, 2246, 2247, 2248, 2249, 2250, 2251, 2252, 2253, 2254, 2255, 2256, 2257, 2258, 2259, 2260, 2261, 2262, 2263, 2264, 2265, 2266, 2267, 2268, 2269, 2270, 2271, 2272, 2273, 2274, 2275, 2276, 2277, 2278, 2279, 2280, 2281, 2282, 2283, 2284, 2285, 2286, 2287, 2288, 2289, 2290, 2291, 2292, 2293, 2294, 2295, 2296, 2297, 2298, 2299, 2300, 2301, 2302, 2303, 2304, 2305, 2306, 2307, 2308, 2309, 2310, 2311, 2312, 2313, 2314, 2315, 2316, 2317, 2318, 2319, 2320, 2321, 2322, 2323, 2324, 2325, 2326, 2327, 2328, 2329, 2330, 2331, 2332, 2333, 2334, 2335, 2336, 2337, 2338, 2339, 2340, 2341, 2342, 2343, 2344, 2345, 2346, 2347, 2348, 2349, 2350, 2351, 2352, 2353, 2354, 2355, 2356, 2357, 2358, 2359, 2360, 2361, 2362, 2363, 2364, 2365, 2366, 2367, 2368, 2369, 2370, 2371, 2372, 2373, 2374, 2375, 2376, 2377, 2378, 2379, 2380, 2381, 2382, 2383, 2384, 2385, 2386, 2387, 2388, 2389, 2390, 2391, 2392, 2393, 2394, 2395, 2396, 2397, 2398, 2399, 2400, 2401, 2402, 2403, 2404, 2405, 2406, 2407, 2408, 2409, 2410, 2411, 2412, 2413, 2414, 2415, 2416, 2417, 2418, 2419, 2420, 2421, 2422, 2423, 2424, 2425, 2426, 2427, 2428, 2429, 2430, 2431, 2432, 2433, 2434, 2435, 2436, 2437, 2438, 2439, 2440, 2441, 2442, 2443, 2444, 2445, 2446, 2447, 2448, 2449, 2450, 2451, 2452, 2453, 2454, 2455, 2456, 2457, 2458, 2459, 2460, 2461, 2462, 2463, 2464, 2465, 2466, 2467, 2468, 2469, 2470, 2471, 2472, 2473, 2474, 2475, 2476, 2477, 2478, 2479, 2480, 2481, 2482, 2483, 2484, 2485, 2486, 2487, 2488, 2489, 2490, 2491, 2492, 2493, 2494, 2495, 2496, 2497, 2498, 2499, 2500, 2501, 2502, 2503, 2504, 2505, 2506, 2507, 2508, 2509, 2510, 2511, 2512, 2513, 2514, 2515, 2516, 2517, 2518, 2519, 2520, 2521, 2522, 2523, 2524, 2525, 2526, 2527, 2528, 2529, 2530, 2531, 2532, 2533, 2534, 2535, 2536, 2537, 2538, 2539, 2540, 2541, 2542, 2543, 2544, 2545, 2546, 2547, 2548, 2549, 2550, 2551, 2552, 2553, 2554, 2555, 2556, 2557, 2558, 2559, 2560, 2561, 2562, 2563, 2564, 2565, 2566, 2567, 2568, 2569, 2570, 2571, 2572, 2573, 2574, 2575, 2576, 2577, 2578, 2579, 2580, 2581, 2582, 2583, 2584, 2585, 2586, 2587, 2588, 2589, 2590, 2591, 2592, 2593, 2594, 2595, 2596, 2597, 2598, 2599, 2600, 2601, 2602, 2603, 2604, 2605, 2606, 2607, 2608, 2609, 2610, 2611, 2612, 2613, 2614, 2615, 2616, 2617, 2618, 2619, 2620, 2621, 2622, 2623, 2624, 2625, 2626, 2627, 2628, 2629, 2630, 2631, 2632, 2633, 2634, 2635, 2636, 2637, 2638, 2639, 2640, 2641, 2642, 2643, 2644, 2645, 2646, 2647, 2648, 2649, 2650, 2651, 2652, 2653, 2654, 2655, 2656, 2657, 2658, 2659, 2660, 2661, 2662, 2663, 2664, 2665, 2666, 2667, 2668, 2669, 2670, 2671, 2672, 2673, 2674, 2675, 2676, 2677, 2678, 26

THE UNIVERSITY OF CHICAGO PRESS

40765

FRANCES M. WHITE,
(Plaintiff) Appellee,

v.

FRANK F. HYNES, JR., as Executor, etc.,
and individually, MARIE F. HYNES and
JAMES R. HYNES,

(Defendants) Appellants.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

302 I.A. 622²

MR. JUSTICE NEWMAN DELIVERED THE OPINION OF THE COURT.

This is an appeal by the defendants from an order entered by the court dismissing the petition of the defendants in said cause. The petition prayed for an order finding that the deficiency decree entered in the foreclosure proceeding be satisfied of record and a judgment over against the plaintiff for negligence of an agent in collecting rents under an assignment of rents made by the defendants in writing as heirs of Frank F. Hynes, deceased, who was the owner of the equity and who purchased the property from the original makers of the notes and trust deed. Frank F. Hynes having assumed and agreed in writing to pay the indebtedness due on the notes secured by the trust deed, and by an extension agreement extending the time of payment of the trust deed, agreed to pay the indebtedness and abide by all covenants contained in the trust which provided for payment of all taxes when due until the due date of the note or any extension thereof.

Frank F. Hynes died prior to the maturity of the note and the institution of the foreclosure proceeding.

The mortgagee in this foreclosure proceeding applied for the appointment of a receiver. The petitioners in order to save the expense of a receivership offered to surrender the operation and management of the premises with an assignment of rents to the mortgagee under an agreement that all rents, except moneys paid for repairs, operating expenses and collection commissions should be applied, as in case

*NOTHING TO BE DONE IN ANY DIRECTIONS UNDER PRESENT PLAN

yd bawjba tawt a awt wib-icic wib yd bawjba awt wib

* These prices are associated with the following conditions: the work is done in the open air, the work is done in the open air, the work is done in the open air.

THE UNITED STATES DEPARTMENT OF THE INTERIOR
BUREAU OF LAND MANAGEMENT

6. The amount of the liability shall be determined by the court.

(continued)

14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 29 30 31 32 33 34 35 36 37 38 39 40 41 42 43 44 45 46 47 48 49 50 51 52 53 54 55 56 57 58 59 60 61 62 63 64 65 66 67 68 69 70 71 72 73 74 75 76 77 78 79 80 81 82 83 84 85 86 87 88 89 90 91 92 93 94 95 96 97 98 99 100 101 102 103 104 105 106 107 108 109 110 111 112 113 114 115 116 117 118 119 120 121 122 123 124 125 126 127 128 129 130 131 132 133 134 135 136 137 138 139 140 141 142 143 144 145 146 147 148 149 150 151 152 153 154 155 156 157 158 159 160 161 162 163 164 165 166 167 168 169 170 171 172 173 174 175 176 177 178 179 180 181 182 183 184 185 186 187 188 189 190 191 192 193 194 195 196 197 198 199 200 201 202 203 204 205 206 207 208 209 210 211 212 213 214 215 216 217 218 219 220 221 222 223 224 225 226 227 228 229 230 231 232 233 234 235 236 237 238 239 240 241 242 243 244 245 246 247 248 249 250 251 252 253 254 255 256 257 258 259 260 261 262 263 264 265 266 267 268 269 270 271 272 273 274 275 276 277 278 279 280 281 282 283 284 285 286 287 288 289 290 291 292 293 294 295 296 297 298 299 300 301 302 303 304 305 306 307 308 309 310 311 312 313 314 315 316 317 318 319 320 321 322 323 324 325 326 327 328 329 330 331 332 333 334 335 336 337 338 339 340 341 342 343 344 345 346 347 348 349 350 351 352 353 354 355 356 357 358 359 360 361 362 363 364 365 366 367 368 369 370 371 372 373 374 375 376 377 378 379 380 381 382 383 384 385 386 387 388 389 390 391 392 393 394 395 396 397 398 399 400 401 402 403 404 405 406 407 408 409 410 411 412 413 414 415 416 417 418 419 420 421 422 423 424 425 426 427 428 429 430 431 432 433 434 435 436 437 438 439 440 441 442 443 444 445 446 447 448 449 450 451 452 453 454 455 456 457 458 459 460 461 462 463 464 465 466 467 468 469 470 471 472 473 474 475 476 477 478 479 480 481 482 483 484 485 486 487 488 489 490 491 492 493 494 495 496 497 498 499 500 501 502 503 504 505 506 507 508 509 510 511 512 513 514 515 516 517 518 519 520 521 522 523 524 525 526 527 528 529 530 531 532 533 534 535 536 537 538 539 540 541 542 543 544 545 546 547 548 549 550 551 552 553 554 555 556 557 558 559 560 561 562 563 564 565 566 567 568 569 570 571 572 573 574 575 576 577 578 579 580 581 582 583 584 585 586 587 588 589 590 591 592 593 594 595 596 597 598 599 600 601 602 603 604 605 606 607 608 609 610 611 612 613 614 615 616 617 618 619 620 621 622 623 624 625 626 627 628 629 630 631 632 633 634 635 636 637 638 639 640 641 642 643 644 645 646 647 648 649 650 651 652 653 654 655 656 657 658 659 660 661 662 663 664 665 666 667 668 669 670 671 672 673 674 675 676 677 678 679 680 681 682 683 684 685 686 687 688 689 690 691 692 693 694 695 696 697 698 699 700 701 702 703 704 705 706 707 708 709 710 711 712 713 714 715 716 717 718 719 720 721 722 723 724 725 726 727 728 729 730 731 732 733 734 735 736 737 738 739 740 741 742 743 744 745 746 747 748 749 750 751 752 753 754 755 756 757 758 759 760 761 762 763 764 765 766 767 768 769 770 771 772 773 774 775 776 777 778 779 780 781 782 783 784 785 786 787 788 789 790 791 792 793 794 795 796 797 798 799 800 801 802 803 804 805 806 807 808 809 810 811 812 813 814 815 816 817 818 819 820 821 822 823 824 825 826 827 828 829 830 831 832 833 834 835 836 837 838 839 840 841 842 843 844 845 846 847 848 849 850 851 852 853 854 855 856 857 858 859 860 861 862 863 864 865 866 867 868 869 870 871 872 873 874 875 876 877 878 879 880 881 882 883 884 885 886 887 888 889 890 891 892 893 894 895 896 897 898 899 900 901 902 903 904 905 906 907 908 909 910 911 912 913 914 915 916 917 918 919 920 921 922 923 924 925 926 927 928 929 930 931 932 933 934 935 936 937 938 939 940 941 942 943 944 945 946 947 948 949 950 951 952 953 954 955 956 957 958 959 960 961 962 963 964 965 966 967 968 969 970 971 972 973 974 975 976 977 978 979 980 981 982 983 984 985 986 987 988 989 990 991 992 993 994 995 996 997 998 999 1000 1001 1002 1003 1004 1005 1006 1007 1008 1009 1010 1011 1012 1013 1014 1015 1016 1017 1018 1019 1020 1021 1022 1023 1024 1025 1026 1027 1028 1029 1030 1031 1032 1033 1034 1035 1036 1037 1038 1039 1040 1041 1042 1043 1044 1045 1046 1

THE UNIVERSITY OF CHICAGO LIBRARY

of the notes and trust funds. Frank J. Lyons, Berlin, assumed the

agreed in writing to pay the indebtedness due on the notes secured

by the first week, and by an additional amount exceeding the time

the agreement and you at home, and start out to journey to

place by all governments concerned in the event which provided for

you go along and to make sure the lights are never lit in this

6. *Chlorophyll a* and *Chlorophyll b* content

THOMAS J. WYMAN died prior to the maturity of the note and the

• preliminary organization and maintenance

The subject in this document is classified as follows:

...of a

Approved for release by NSA on 08-28-2014 pursuant to E.O. 13526

23.02 4. 97. 11. 11. 12. 13. 14. 15. 16. 17. 18. 19. 20. 21. 22. 23. 24. 25. 26. 27. 28. 29. 30. 31. 32. 33. 34. 35. 36. 37. 38. 39. 40. 41. 42. 43. 44. 45. 46. 47. 48. 49. 50. 51. 52. 53. 54. 55. 56. 57. 58. 59. 60. 61. 62. 63. 64. 65. 66. 67. 68. 69. 70. 71. 72. 73. 74. 75. 76. 77. 78. 79. 80. 81. 82. 83. 84. 85. 86. 87. 88. 89. 90. 91. 92. 93. 94. 95. 96. 97. 98. 99. 100. 101. 102. 103. 104. 105. 106. 107. 108. 109. 110. 111. 112. 113. 114. 115. 116. 117. 118. 119. 120. 121. 122. 123. 124. 125. 126. 127. 128. 129. 130. 131. 132. 133. 134. 135. 136. 137. 138. 139. 140. 141. 142. 143. 144. 145. 146. 147. 148. 149. 150. 151. 152. 153. 154. 155. 156. 157. 158. 159. 160. 161. 162. 163. 164. 165. 166. 167. 168. 169. 170. 171. 172. 173. 174. 175. 176. 177. 178. 179. 180. 181. 182. 183. 184. 185. 186. 187. 188. 189. 190. 191. 192. 193. 194. 195. 196. 197. 198. 199. 200. 201. 202. 203. 204. 205. 206. 207. 208. 209. 210. 211. 212. 213. 214. 215. 216. 217. 218. 219. 220. 221. 222. 223. 224. 225. 226. 227. 228. 229. 230. 231. 232. 233. 234. 235. 236. 237. 238. 239. 240. 241. 242. 243. 244. 245. 246. 247. 248. 249. 250. 251. 252. 253. 254. 255. 256. 257. 258. 259. 260. 261. 262. 263. 264. 265. 266. 267. 268. 269. 270. 271. 272. 273. 274. 275. 276. 277. 278. 279. 280. 281. 282. 283. 284. 285. 286. 287. 288. 289. 290. 291. 292. 293. 294. 295. 296. 297. 298. 299. 300. 301. 302. 303. 304. 305. 306. 307. 308. 309. 310. 311. 312. 313. 314. 315. 316. 317. 318. 319. 320. 321. 322. 323. 324. 325. 326. 327. 328. 329. 330. 331. 332. 333. 334. 335. 336. 337. 338. 339. 340. 341. 342. 343. 344. 345. 346. 347. 348. 349. 350. 351. 352. 353. 354. 355. 356. 357. 358. 359. 360. 361. 362. 363. 364. 365. 366. 367. 368. 369. 370. 371. 372. 373. 374. 375. 376. 377. 378. 379. 380. 381. 382. 383. 384. 385. 386. 387. 388. 389. 390. 391. 392. 393. 394. 395. 396. 397. 398. 399. 400. 401. 402. 403. 404. 405. 406. 407. 408. 409. 410. 411. 412. 413. 414. 415. 416. 417. 418. 419. 420. 421. 422. 423. 424. 425. 426. 427. 428. 429. 430. 431. 432. 433. 434. 435. 436. 437. 438. 439. 440. 441. 442. 443. 444. 445. 446. 447. 448. 449. 450. 451. 452. 453. 454. 455. 456. 457. 458. 459. 460. 461. 462. 463. 464. 465. 466. 467. 468. 469. 470. 471. 472. 473. 474. 475. 476. 477. 478. 479. 480. 481. 482. 483. 484. 485. 486. 487. 488. 489. 490. 491. 492. 493. 494. 495. 496. 497. 498. 499. 500. 501. 502. 503. 504. 505. 506. 507. 508. 509. 510. 511. 512. 513. 514. 515. 516. 517. 518. 519. 520. 521. 522. 523. 524. 525. 526. 527. 528. 529. 530. 531. 532. 533. 534. 535. 536. 537. 538. 539. 540. 541. 542. 543. 544. 545. 546. 547. 548. 549. 550. 551. 552. 553. 554. 555. 556. 557. 558. 559. 560. 561. 562. 563. 564. 565. 566. 567. 568. 569. 570. 571. 572. 573. 574. 575. 576. 577. 578. 579. 580. 581. 582. 583. 584. 585. 586. 587. 588. 589. 590. 591. 592. 593. 594. 595. 596. 597. 598. 599. 600. 601. 602. 603. 604. 605. 606. 607. 608. 609. 610. 611. 612. 613. 614. 615. 616. 617. 618. 619. 620. 621. 622. 623. 624. 625. 626. 627. 628. 629. 630. 631. 632. 633. 634. 635. 636. 637. 638. 639. 640. 641. 642. 643. 644. 645. 646. 647. 648. 649. 650. 651. 652. 653. 654. 655. 656. 657. 658. 659. 660. 661. 662. 663. 664. 665. 666. 667. 668. 669. 670. 671. 672. 673. 674. 675. 676. 677. 678. 679. 680. 681. 682. 683. 684. 685. 686. 687. 688. 689. 690. 691. 692. 693. 694. 695. 696. 697. 698. 699. 700. 701. 702. 703. 704. 705. 706. 707. 708. 709. 710. 711. 712. 713. 714. 715. 716. 717. 718. 719. 720. 721. 722. 723. 724. 725. 726. 727. 728. 729. 730. 731. 732. 733. 734. 735. 736. 737. 738. 739. 740. 741. 742. 743. 744. 745. 746. 747. 748. 749. 750. 751. 752. 753. 754. 755. 756. 757. 758. 759. 760. 761. 762. 763. 764. 765. 766. 767. 768. 769. 770. 771. 772. 773. 774. 775. 776. 777. 778. 779. 780. 781. 782. 783. 784. 785. 786. 787. 788. 789. 790. 791. 792. 793. 794. 795. 796. 797. 798. 799. 800. 801. 802. 803. 804. 805. 806. 807. 808. 809. 810. 811. 812. 813. 814. 815. 816. 817. 818. 819. 820. 821. 822. 823. 824. 825. 826. 827. 828. 829. 830. 831. 832. 833. 834. 835. 836. 837. 838. 839. 840. 841. 842. 843. 8

22.11.1949. 10.11.1949. 11.11.1949. 12.11.1949. 13.11.1949. 14.11.1949. 15.11.1949. 16.11.1949. 17.11.1949. 18.11.1949. 19.11.1949. 20.11.1949. 21.11.1949. 22.11.1949. 23.11.1949. 24.11.1949. 25.11.1949. 26.11.1949. 27.11.1949. 28.11.1949. 29.11.1949. 30.11.1949. 1.12.1949. 2.12.1949. 3.12.1949. 4.12.1949. 5.12.1949. 6.12.1949. 7.12.1949. 8.12.1949. 9.12.1949. 10.12.1949. 11.12.1949. 12.12.1949. 13.12.1949. 14.12.1949. 15.12.1949. 16.12.1949. 17.12.1949. 18.12.1949. 19.12.1949. 20.12.1949. 21.12.1949. 22.12.1949. 23.12.1949. 24.12.1949. 25.12.1949. 26.12.1949. 27.12.1949. 28.12.1949. 29.12.1949. 30.12.1949. 31.12.1949. 1.1.1950. 2.1.1950. 3.1.1950. 4.1.1950. 5.1.1950. 6.1.1950. 7.1.1950. 8.1.1950. 9.1.1950. 10.1.1950. 11.1.1950. 12.1.1950. 13.1.1950. 14.1.1950. 15.1.1950. 16.1.1950. 17.1.1950. 18.1.1950. 19.1.1950. 20.1.1950. 21.1.1950. 22.1.1950. 23.1.1950. 24.1.1950. 25.1.1950. 26.1.1950. 27.1.1950. 28.1.1950. 29.1.1950. 30.1.1950. 31.1.1950. 1.2.1950. 2.2.1950. 3.2.1950. 4.2.1950. 5.2.1950. 6.2.1950. 7.2.1950. 8.2.1950. 9.2.1950. 10.2.1950. 11.2.1950. 12.2.1950. 13.2.1950. 14.2.1950. 15.2.1950. 16.2.1950. 17.2.1950. 18.2.1950. 19.2.1950. 20.2.1950. 21.2.1950. 22.2.1950. 23.2.1950. 24.2.1950. 25.2.1950. 26.2.1950. 27.2.1950. 28.2.1950. 29.2.1950. 30.2.1950. 31.2.1950. 1.3.1950. 2.3.1950. 3.3.1950. 4.3.1950. 5.3.1950. 6.3.1950. 7.3.1950. 8.3.1950. 9.3.1950. 10.3.1950. 11.3.1950. 12.3.1950. 13.3.1950. 14.3.1950. 15.3.1950. 16.3.1950. 17.3.1950. 18.3.1950. 19.3.1950. 20.3.1950. 21.3.1950. 22.3.1950. 23.3.1950. 24.3.1950. 25.3.1950. 26.3.1950. 27.3.1950. 28.3.1950. 29.3.1950. 30.3.1950. 31.3.1950. 1.4.1950. 2.4.1950. 3.4.1950. 4.4.1950. 5.4.1950. 6.4.1950. 7.4.1950. 8.4.1950. 9.4.1950. 10.4.1950. 11.4.1950. 12.4.1950. 13.4.1950. 14.4.1950. 15.4.1950. 16.4.1950. 17.4.1950. 18.4.1950. 19.4.1950. 20.4.1950. 21.4.1950. 22.4.1950. 23.4.1950. 24.4.1950. 25.4.1950. 26.4.1950. 27.4.1950. 28.4.1950. 29.4.1950. 30.4.1950. 31.4.1950. 1.5.1950. 2.5.1950. 3.5.1950. 4.5.1950. 5.5.1950. 6.5.1950. 7.5.1950. 8.5.1950. 9.5.1950. 10.5.1950. 11.5.1950. 12.5.1950. 13.5.1950. 14.5.1950. 15.5.1950. 16.5.1950. 17.5.1950. 18.5.1950. 19.5.1950. 20.5.1950. 21.5.1950. 22.5.1950. 23.5.1950. 24.5.1950. 25.5.1950. 26.5.1950. 27.5.1950. 28.5.1950. 29.5.1950. 30.5.1950. 31.5.1950. 1.6.1950. 2.6.1950. 3.6.1950. 4.6.1950. 5.6.1950. 6.6.1950. 7.6.1950. 8.6.1950. 9.6.1950. 10.6.1950. 11.6.1950. 12.6.1950. 13.6.1950. 14.6.1950. 15.6.1950. 16.6.1950. 17.6.1950. 18.6.1950. 19.6.1950. 20.6.1950. 21.6.1950. 22.6.1950. 23.6.1950. 24.6.1950. 25.6.1950. 26.6.1950. 27.6.1950. 28.6.1950. 29.6.1950. 30.6.1950. 31.6.1950. 1.7.1950. 2.7.1950. 3.7.1950. 4.7.1950. 5.7.1950. 6.7.1950. 7.7.1950. 8.7.1950. 9.7.1950. 10.7.1950. 11.7.1950. 12.7.1950. 13.7.1950. 14.7.1950. 15.7.1950. 16.7.1950. 17.7.1950. 18.7.1950. 19.7.1950. 20.7.1950. 21.7.1950. 22.7.1950. 23.7.1950. 24.7.1950. 25.7.1950. 26.7.1950. 27.7.1950. 28.7.1950. 29.7.1950. 30.7.1950. 31.7.1950. 1.8.1950. 2.8.1950. 3.8.1950. 4.8.1950. 5.8.1950. 6.8.1950. 7.8.1950. 8.8.1950. 9.8.1950. 10.8.1950. 11.8.1950. 12.8.1950. 13.8.1950. 14.8.1950. 15.8.1950. 16.8.1950. 17.8.1950. 18.8.1950. 19.8.1950. 20.8.1950. 21.8.1950. 22.8.1950. 23.8.1950. 24.8.1950. 25.8.1950. 26.8.1950. 27.8.1950. 28.8.1950. 29.8.1950. 30.8.1950. 31.8.1950. 1.9.1950. 2.9.1950. 3.9.1950. 4.9.1950. 5.9.1950. 6.9.1950. 7.9.1950. 8.9.1950. 9.9.1950. 10.9.1950. 11.9.1950. 12.9.1950. 13.9.1950. 14.9.1950. 15.9.1950. 16.9.1950. 17.9.1950. 18.9.1950. 19.9.1950. 20.9.1950. 21.9.1950. 22.9.1950. 23.9.1950. 24.9.1950. 25.9.1950. 26.9.1950. 27.9.1950. 28.9.1950. 29.9.1950. 30.9.1950. 31.9.1950. 1.10.1950. 2.10.1950. 3.10.1950. 4.10.1950. 5.10.1950. 6.10.1950. 7.10.1950. 8.10.1950. 9.10.1950. 10.10.1950. 11.10.1950. 12.10.1950. 13.10.1950. 14.10.1950. 15.10.1950. 16.10.1950. 17.10.1950. 18.10.1950. 19.10.1950. 20.10.1950. 21.10.1950. 22.10.1950. 23.10.1950. 24.10.1950. 25.10.1950. 26.10.1950. 27.10.1950. 28.10.1950. 29.10.1950. 30.10.1950. 31.10.1950. 1.11.1950. 2.11.1950. 3.11.1950. 4.11.1950. 5.11.1950. 6.11.1950. 7.11.1950. 8.11.1950. 9.11.1950. 10.11.1950. 11.11

[illegible]

of foreclosure receivership, in reduction of the debt or deficiency decree remaining unpaid after foreclosure sale, and with an additional agreement that the mortgagee would grant the heirs an option of sixty days after the usual period of redemption to redeem the premises by purchase of the mortgagee's title obtained through the Master's deed. This offer was accepted and a motion for the appointment of a receiver was withdrawn.

The contract, the subject of this controversy, was prepared and signed by the parties. One of the provisions provided for the operating expenses of the building as follows:

"and all funds so collected, excepting for necessary repairs, decorations and customary commissions and operating expenses, shall be applied in the reduction of the amount due on said notes secured by said trust deed or in the amount found due under the Decree of Sale that shall at any time hereafter be entered in the above entitled cause upon said amount found to be due the complainant under said decree, with the further understanding that the question of rents, the amount of rent, the making, execution and delivery of leases, necessary repairs, decorations and other operating expenses, and all other matters relative to the income of said premises, shall be subject to the approval of said Leslie M. Whipp, as attorney for the party of the first part."

A further provision was inserted in this contract by the plaintiff providing that:

"The first party for the consideration hereinabove mentioned hereby gives and grants to the second party or their assigns, an option, to be exercised at any time within sixty days after the recording of a Master's deed of said premises to the first party, to purchase the above described real estate at and for a price equal to the amount then remaining due and unpaid under said foreclosure decree with lawful interest thereon from the date of said sale, together with all other costs incident thereto, such as revenue stamps, recording fees, etc., with the further understanding and agreement that the net income of said property collected under said assignment of rents, before sale and during the period of redemption shall be applied in reduction of the amount due on said mortgage, or decree to the first party, provided, however, that nothing herein contained shall in any manner prevent the payment of said moneys so collected from the rents, issues and profits of said property in the payment of general and special taxes now due or hereafter to become due on said premises."

By agreement, L. C. Kearney was the agent who collected the rents from the premises in question, and he was appointed by approval of the defendants.

The writer's best. This offer was advanced and a motion for the
the proceeds by purchase of the stockholder's stock obtained through
option of sixty days after the usual period of redemption as between
admission suggested that the mortgage could cover the debt in
known remaining unpaid after foreclosure sale, and also as
of foreign exchange responsibility, in reduction of the cost of delivery

The contract, the subject of this correspondence, was prepared and signed by the parties. One of the provisions provided for the operation business of the building as follows:

[illegible]

Approved for Release by NSA on 09-11-2013 pursuant to E.O. 13526

It is the policy of the Government to provide for the payment of interest on the principal of the loan in the form of a sinking fund. The sinking fund is a fund of money set aside for the purpose of paying the interest on the loan. The sinking fund is a fund of money set aside for the purpose of paying the interest on the loan. The sinking fund is a fund of money set aside for the purpose of paying the interest on the loan.

Reference is made to the fact that the above information was obtained from the files of the Department of the Interior, Bureau of Land Management, and the Bureau of Reclamation, and that the same information was also obtained from the files of the Department of the Interior, Bureau of Land Management, and the Bureau of Reclamation.

the ranks from the previous position, and he was appointed by

The trial court having heard evidence in open court both on behalf of the plaintiff and the defendants, found by its order that the agent was diligent in the handling of said property and the plaintiff was not in any manner amenable to criticism or damages by reason of any fault on her part in failing to collect rents, as the only tenant that was in arrears in payment of rent was a man named Johnson, who was a tenant of the defendants at the time the assignment was made. The court gave credit to the defendants for a \$400 certificate of interest, which was accepted by the agent with the full acquiescence and consent of Hynes heirs, in lieu of back rent.

The plaintiff relies upon the theory of law that the purchaser at a judicial sale under a foreclosure decree takes the property subject to all prior liens for taxes and has no equity against the mortgagor for payment of taxes, which the defendants concede to be a proper statement of the law, and if there had been no written agreements, the plaintiff also would have taken the property subject to all prior liens for taxes, and from what we gather from the contention of the parties, the subject matter in dispute is not upon the question of the payment of the taxes, but upon the question of the plaintiff taking credit in her account for taxes that became due and were a lien upon the premises up to the time of the receipt of the master's deed and subsequent thereto.

The defendants who filed their petition admit that they did not exercise their right to redeem the property as provided for in the contract and that the question is as to the application of rents received upon the deficiency decree entered by the court at the time the foreclosure decree was entered. This deficiency decree is for the sum of \$2,072.99, and it is the contention that the basic rights of the mortgagor and the mortgagee were to have the rents applied on the deficiency decree, and that the right of

THE COURT THEREUPON RECEIVED EVIDENCE IN OPEN COURT AS FOLLOWS:

ON BEHALF OF THE PLAINTIFF AND THE DEFENDANT, TESTIMONY BY THE COURT:

THE PLAINTIFF WAS NOT IN ANY MANNER AVAILABLE TO TESTIFY OR

EXPLAIN BY REASON OF ANY DISEASE OR ANY OTHER CAUSE IN ORDER TO EXPLAIN

THE SAME, AS THE ONLY EVIDENCE THAT WAS IN ORDER TO EXPLAIN AT THAT

WAS A MAN NAMED JOHNSON, WHO WAS A FRIEND OF THE DEFENDANT AT THE

TIME THE DEFENDANT WAS ARRESTED. THE COURT THEREUPON RECEIVED

EVIDENCE FOR A 1900 CERTIFICATE OF INTEREST, WHICH WAS RECEIVED

BY THE COURT WITH THE FULL NECESSARIES AND CONSENT OF THE PLAINTIFF

IN ORDER TO BE HEARD.

THE PLAINTIFF TESTIFIED UPON THE THEORY OF THE COURT THAT THE

DEFENDANT IS A PERSONAL FRIEND OF THE PLAINTIFF AND THAT THE

PROPERTY SUBJECT TO ALL OTHER INTERESTS IN THE SAME AND HAS NO EQUITY

AGAINST THE DEFENDANT FOR PAYMENT OF DEBTS, WHICH THE DEFENDANT

CONCEDES TO BE A PROPER STATEMENT OF THE FACT, AND IF THERE HAD BEEN

NO OTHER AGREEMENT, THE PLAINTIFF ALSO WOULD HAVE BEEN THE

PROPERTY SUBJECT TO ALL OTHER INTERESTS IN THE SAME, AND THAT THE

DEFENDANT FROM THE CONSTRUCTION OF THE PLAINTIFF, THE SUBJECT MATTER IS

ALSO IN THE COURT OF THE PLAINTIFF AT THE TIME OF THE DEATH, BUT

WAS NOT THE QUESTION OF THE PLAINTIFF BEING GRANTED IN THE MANNER

OF THE COURT THAT BECAME THE LAW AND THAT THE PLAINTIFF WAS

THE TIME OF THE RECEIPT OF THE MORTGAGE, THE DEED AND INTEREST THEREIN.

THE DEFENDANT WHO TESTIFIED UPON THE THEORY THAT THEY

DID NOT EXERCISE THEIR RIGHT TO REVOKE THE PROPERTY AS PROVIDED FOR

IN THE CONTRACT AND THAT THE QUESTION IS AS TO THE VALIDITY OF

THE CONTRACT UPON THE DEFENDANT'S DEATH, AS SET FORTH BY THE COURT AT

THE TIME THE DEFENDANT DECEASED WAS ENTERED. THIS DEFENDANT

DECEASED AS FOR THE SUM OF \$1,000.00, AND IT IS THE CONSTRUCTION THAT

THE BASIC RIGHTS OF THE MORTGAGEE AND THE MORTGAGEE WERE TO HAVE

THE RIGHTS APPLIED ON THE DEFENDANT'S DEATH, AND THAT THE RIGHT OF

the purchaser was to receive the redemption money plus taxes actually paid in case there was a redemption, and if no redemption, to receive the master's deed to the premises subject to the prior lien of taxes at the time of the sale and that had since accrued, and that the trial court's construction of the contract was based upon manifestly wrong premises as to these rights. The contract reversed those basic rights, so that, as we have stated, we will have to consider the provisions of this contract entered into by the parties at the time the mortgagee was put in possession for the purpose of collecting rents and applying them as provided for by the contract. In construing the contract the court considered the intention of the parties, and we quite agree with the contention of these defendants that there were two separate and distinct objectives expressed in the contract - the first, to apply the rents on the deficiency decree, and the second, to give the mortgagors an option to redeem or purchase on a basis equivalent to a statutory redemption.

The defendants not having exercised the option provided for in the contract, the sole question that seems to be involved in this litigation is whether the plaintiff is entitled to the credit of the unpaid taxes. It is suggested by the defendants that without the agreement having been executed by the parties, the plaintiff could, under her trust deed, at any time before entry of the decree, have paid the taxes and included them in her decree and such payment would have been, as counsel for the plaintiff says, "as much to defendants' advantage as to the advantage of the plaintiff", that is to say, the value of the defendants' equity in the property would have been increased by the amount of the taxes paid to the same extent that the plaintiff's debt would have been increased. There seems to be no denial in this case that if the property had a value of \$5,331.59, the sale price, subject to taxes of \$841.30 then due, it

the mortgage was to receive the redemption money from Jones
actually paid in case there was a redemption, and if no redemption,
to receive the mortgagee's share in the proceeds subject to the prior
lien of Jones at the time of the sale and that since mortgage
and that the trial court's construction of the contract was based
upon manifestly wrong premises as to these rights. The contract
reverted those basic rights, so that, as we have stated, we will
have to consider the provisions of this contract entered into by
the parties at the time the mortgage was put in possession for the
purpose of collecting debts and applying them as provided for by
the contract. In construing the contract the court considered the
intent of the parties, and we find the intent of the construction
of these provisions that there were two separate and distinct
obligations expressed in the contract - the first, to apply the funds
on the delinquent account, and the second, to give the mortgagee an
option to receive at least as a basis equivalent to a statutory
redemption.

The defendant not having exercised her option provided
for in the contract, the rule extension does seem to be involved
in this litigation is whether the plaintiff is entitled to the value
of the unpaid taxes. It is suggested by the defendant that without
the agreement having been executed by the parties, the plaintiff
could, under any state of facts, at any time before entry of the decree,
have paid the taxes and included them in her account and upon payment
would have been, as counsel for the plaintiff says, "as much as
satisfied" mortgage as to the mortgage of the plaintiff, who is
to say, the value of the defendant's equity in the property would
have been increased by the amount of the taxes paid on the same extent
that the plaintiff's debt would have been increased. There seems
to be no denial in this case that if the property had a value of
\$2,221.22, the tax paid, subject to taxes of \$211.20 when due, is

would have had a value of \$5,872.88, if the taxes had been paid before the sale. It does appear from paragraph 4 of the contract that the plaintiff agreed to bid at the sale what she believed the property to be worth and in an amount that would insure application of the rents to her debt during the redemption period, and it seems rather unusual that the plaintiff should claim she is entitled to the credit for taxes that have not been paid by her, which of course would reduce the amount of money in her hands. The contract itself provides that:

"All funds so collected, excepting for necessary repairs, etc. shall be applied in the reduction of the amount due on said notes secured by said trust deed, or in the amount found due under the decree of sale that shall at any time hereafter be entered."

Then applying that part of the contract which was prepared by the plaintiff, we find this language used:

"with the further understanding and agreement that the net income of said property collected under said assignment of rents, before sale and during the period of redemption shall be applied in reduction of the amount due on said mortgage, or decree to the first party, provided, however, that nothing herein contained shall in any manner prevent the payment of said moneys so collected from the rents, issues and profits of said property in the payment of general and special taxes now due or hereafter to become due on said premises."

The language is clear that the plaintiff would be entitled to take credit for taxes that had been paid, and not otherwise. In construing the contract the court was in error in denying the accounting asked for to ascertain the amount in the hands of the plaintiff, after proper deductions, which was to be applied in payment, in whole or in part, of the deficiency decrees.

Another question is called to our attention, and that is as to the allowance of \$400 for rent due from Johnson, which was charged against the plaintiff. There is evidence sufficient to justify this allowance by the court.

After considering the questions that have been called

to our attention, we are of the opinion that the court should have allowed the accounting as prayed for by the defendants. For the reasons stated the court erred in dismissing the petition of these defendants, and the order is reversed and the cause is remanded.

REVERSED AND REMANDED.

DENIS E. SULLIVAN, P.J. AND BURKE, J. CONCUR.

40774

EDWARD P. ANDERSON and MICHAEL J. LONG,
as Successor Trustee,

APPEAL FROM

Appellees,

SUPERIOR COURT

v.
PEARL WEISS, et al.,

Appellees.

COOK COUNTY.

On Appeal of FRANK HENRICHSON,

Appellant.

302 I.A. 623

MR. JUSTICE NEBEL DELIVERED THE OPINION OF THE COURT.

This is a foreclosure suit filed on January 28, 1932, in which a decree of foreclosure and sale was entered on May 13, 1936. The trust deed involved in the foreclosure proceedings was executed in August, 1928, and the first default occurred within two years thereafter. The indebtedness consisted of a bond issue of 220 bonds aggregating \$80,000. and the property pledged is a combination business and residential building located on the North side of Chicago, at 6236 Broadway. The building is three stories and contains four stores and eight four-room apartments and five garages in the rear. When the decree of foreclosure and sale was entered in May, 1936, the property was in tax receivership under the Skarda Act for two years and has been operated ever since by the county treasurer as receiver. At the commencement of the tax receivership in July, 1934, there was due in general taxes on this property for the years 1932 to 1934 inclusive, the sum of \$10,100. including penalties.

Seven attempts were made extending over a period of one and one-half years to have the property sold to satisfy the decree. At the first five of these sales no bidders appeared. At the sixth sale held on May 28, 1938, there were two bidders, one of which offered the sum of \$5,000 cash. This was an outside bid. This last sale was advertised three times in each of the Chicago Evening



Mr. JUSTICE WHELAN advised the officer of the court. This is a foreclosure suit filed on January 22, 1933, in which a decree of foreclosure and sale was entered on May 13, 1933. The trust deed involved in the foreclosure proceedings was executed in August, 1928, and the first default occurred within two years thereafter. The indebtedness consisted of a bond issue of \$50 bonds aggregating \$10,000, and the property pledged is a combination business and residential building located on the North side of Chicago, at 6200 Broadway. The building is three stories and contains four stories and eight footings apartments and five garages in the rear. When the decree of foreclosure and sale was entered in May, 1933, the property was in the receivership under the decree for two years and has been operated ever since by the equity receiver as receiver. At the commencement of the receivership in July, 1934, there was due in general taxes on this property for the years 1933 to 1934 inclusive, the sum of \$10,100, including penalties. Seven attempts were made extending over a period of one and one-half years to have the property sold to satisfy the taxes. At the first five of these sales no bidder appeared. At the sixth sale held on May 26, 1935, there were two bidders, one of which offered the sum of \$5,000 cash. This was an outside bid. This last sale was attended three times in each of the Chicago evening

American, Chicago Daily Tribune, and the Chicago Daily News, making nine publications in all, extending over a period of three weeks. Thereafter on October 24, 1938, the trustee-complainant filed a petition which recited that six sales had been held, related the outcome of all of them, and stated that the bondholders committee was at no time in a position to purchase the property for the benefit of the bondholders; that the trustee had received an offer to bid \$6,000 if another sale was held; that the advertising cost of the previous six sales was over \$500. Upon consideration of the petition filed by the trustee-complainant the court directed a further sale to be held within thirty days. The seventh sale was held on November 23, 1938, and the petitioner in this action bid \$6,000. On the coming in of the Master's report of sale and without hearing any evidence, the court refused to confirm the sale. Thereafter on December 22, 1938, Frank Herrbach, the bidder at the seventh sale filed a verified petition in which he alleged the history of the proceedings since the entry of the decree including the facts relating to the seven sales, the situation concerning the taxes, the operation of the property at a loss for four and one-half years by the County Treasurer, and the fact that the price bid by him was a fair price for the property, and stating that the order of the court entered on November 29, 1938, was contrary to the facts in the case and the law applicable thereto; that said order should be vacated and set aside and that the sale held on November 23, 1938, should be approved by the court. An order was entered by the court on December 22, 1938, that this cause coming on to be heard upon the verified petition of Frank Herrbach, bidder at the master's sale heretofore held herein on November 23, 1938 praying for the entry of an order vacating the order heretofore entered herein on November 29, 1938, disaffirming the said sale held November 23, 1938,

At the hearing on the motion for summary judgment, the court was informed that the plaintiff had been unable to produce any evidence in support of its claim. The court, therefore, granted the motion for summary judgment and dismissed the complaint with prejudice.

and upon due notice to all attorneys of record in this cause, the court having read and examined said petition and being fully advised in the premises, it is ordered that the prayer of the petition be denied. It is from this order that the petitioner appeals.

The petitioner served notice on the attorneys of record of the filing of the petition, but it does not appear that a rule was entered upon the parties in interest to file an answer to the petition, and it does not appear that an offer of evidence was made by the petitioner setting up the facts relied upon.

The petitioner in support of his position that the court heard the matter without an answer being filed or evidence heard on behalf of the petitioner at the time this petition was before the court calls our attention to the case of Roth v. Roth, 284 Ill. App. 71, a divorce proceeding in which this court said:

"In courts of record the courts and counsel should be very careful to see that a cause is 'at issue' by having proper pleadings on file before commencing the hearing of evidence. Pleadings without proof are of no avail on final hearing and, by the same token, proof without pleadings is useless. In this court counsel attempts to defend such procedure by saying that having heard the evidence on both sides the doctrine of waiver applies.

This suit having been commenced before the present Practice Act, Section 30 of the Chancery Act, Cahill's Illinois Revised Statutes, 1932, ch. 22, par. 30, was still in force and reads as follows:

'Cross-Bill. Any defendant may, after filing his answer, exhibit and file his cross-bill, and call upon the complainant to file his answer thereto, in such time as may be prescribed by the court.'

And then, we say:

"Until the proper pleadings are on file and the issues made to which evidence could be applied, we cannot further consider the appeal."

Now, in the instant case the petitioner did not apply for a rule upon the attorneys who appeared of record to file an answer within such time as the court deemed proper, so that the issue could be joined and the question of whether or not this bid was a fair one and whether there was objection, but instead, the petitioner proceeded

and upon the notice to all attorneys of record in this cause, the
court being held and adjourned with writing and being fully
advised in the premises, it is ordered that the prayer of the
petition be denied. It is from this order that the petitioners appeal.
The petitioners submit that the petition is timely
of the filing of the petition, but it does not appear that a rule
was entered upon the petition in interest to file an answer to the
petition, and it does not appear that an order of adjournment was made
by the petitioner setting up the facts relied upon.
The petition is in support of his position that the court
heard the matter without an answer being filed or evidence being
submitted of the petitioners of the fact this petition was before the
court and this was attention to the case of John v. John, 200 Ill. 200.
It is a divorce proceeding in which this court said:

"In cases of divorce the facts and circumstances should be
very carefully and fully stated in the petition, by stating every
allegation on the petition and the evidence of witnesses
furnishing without need of an oath or proof beyond what
by the court, every allegation is sustained. In this
court cannot sustain a divorce and adjournment by setting up
facts heard the evidence on both sides the petitioners of which
against.
This will having been commenced before the court
petitioners of the petitioners, John v. John, 200 Ill. 200.
and heard on the following:
'Upon the bill, my husband may, after filing his answer,
waive and file his cross-bill, and still upon the complaint
to file his answer thereto, in such time as may be prescribed
by the court.'"

and that, as said:
"Until the proper pleadings are on file and the issues made as
plain evidence could be applied, no demand for a
the court."
and, as the instant case the petitioners did not apply for a rule
upon the attorneys who appeared at record to file an answer within
such time as the court deemed proper, so that the issue could be
joined and the question of whether or not this did was a fair one
and whether there was objection, but instead, the petitioners approached

4
to a hearing without having a rule entered so that the issue could be joined, and in reply to the complaint that the court did not hear any evidence, it does not appear that this petitioner offered to prove any facts in order that we could consider whether those facts were germane and whether the court should have heard evidence as was suggested by the petitioner in support of his petition. From an examination of the record the petition is all there was before the court, and no doubt, the court after considering the petition and that the issue upon the petition was not joined, properly held that the petitioner was not entitled to his relief, and when we come to read the brief of the petitioner we find that he regards this very question as important because he states that the summary denial of this petition without ruling all parties as desiring to answer it, was improper, and if there was any doubt in the court's mind of the truth of any of the facts sworn to by the petitioner an issue could have been made up by an answer, that no such rule to answer was entered, and the court entered an order summarily denying the prayer of the petition, and this the petitioner claims was error. If error, then it was because of the failure of the petitioner to act in obtaining a rule upon the parties interested to answer, and because of failure to offer evidence, and we think the court was justified in entering an order denying the motion of this petitioner to vacate the order entered on November 19, 1938, refusing to approve the master's report of sale.

For the reasons stated, the order of the court is affirmed.

ORDER AFFIRMED.

DENIS E. SULLIVAN, P. J. AND BURKE, J. CONCUR.

to a hearing without having a wife entered no that the issue could be joined, and in reply to the complaint that the court did not hear any evidence, it does not appear that this petitioner offered to prove any facts in order that we could consider whether there were any persons and whether the court should have heard evidence as was suggested by the petitioner in support of his petition. From an examination of the record the petition is all there was before the court, and no doubt, the court after considering the petition and that the issue upon the petition was not joined, properly held that the petitioner was not entitled to his relief, and that he was to take the issue of the petition as it was. As to the very question of evidence, because the issue was the primary basis of this petition without taking all evidence as to answer it, was improper, and all there was any doubt in the court's mind of the truth of any of the facts sworn to by the petitioner in issue could have been made up by a jury, and the court was to answer and entered, and the court entered an order denying the prayer of the petition, and this the petitioner claims was error. If error, then it was because of the failure of the petitioner to set up evidence in this case, and the court's failure to answer, and because of failure to offer evidence, and we think the court was justified in entering an order denying the motion of this petitioner to vacate the order entered on November 10, 1932, relating to remove the answer to a report of sale.

For the reasons stated, the order of the court is

affirmed.

ORDER AFFIRMED.

JOHN E. HANCOCK, J. AND MARY, J. CONCUR.

40784

FRANK GELLER and ISIDORE KRACHOOK,

(Plaintiffs) Appellees,

v.

OLIVE RUTH PETERSEN, BELMONT REALTY
COMPANY, a corporation, LAKE WISS TRUST
AND HAVISSA BARE, as Trustee, and S. J.
GOULD, a bachelor,

Defendants.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

On Appeal of SAMUEL J. GOULD,
(Defendant) appellant.

302 I.A. 623²

MR. JUSTICE NEBEL DELIVERED THE OPINION OF THE COURT.

This is a complaint to foreclose the lien of a mortgage trust deed. Upon a master's report the court found the total sum of \$15,872 to be due, and as part of that sum allowed \$1,500 as "reasonable attorney's fees" under the terms of the trust deed, and decreed the sale of the property to satisfy the debt.

The cause was presented upon an amended complaint. The original complaint was filed by Oscar Turner. Later Geller and Krachook became owners of the trust deed and notes and were substituted as plaintiffs. Samuel J. Gould became the owner of the equity and was substituted as a defendant. It does not appear that the sufficiency of the pleadings upon which the decree was entered is in question. After decree, and without vacating it, and upon the supplemental petition of Samuel J. Gould, the matter was re-referred to the master in chancery for a hearing upon the status and priority of a leasehold interest in the property owned by Krachook, one of the plaintiffs. The master reaffirmed his report that the lease was valid and superior to the trust deed. Samuel J. Gould excepted to the original and supplemental report of the master as to the lease and the allowance of fees and expenses. On December 12, 1938, the court overruled Gould's exceptions as to the priority of the lease, and on December 13, 1938 the court overruled his

exceptions as to the allowance of attorney's fees. This appeal by the defendant Gould is from that part of the decree which allows \$1,500 as attorney's fees to the plaintiffs.

The right of the plaintiffs to foreclose their trust deed was not questioned in the trial court. The trust deed in foreclosure provides that as part of the expenses of foreclosure "reasonable attorney's fees" may be included and taxed as costs and included in any decree.

The master recommended an allowance of \$1,500 as a fair, reasonable and customary charge in Cook County for the services rendered for the plaintiffs. The proof of services performed and the value thereof was made by Meyer Abrams, one of the attorneys of record. Our attention is called to his testimony by the defendant here, which shows that he examined the recorder's records and the original complaint and answers; prepared an amendment and obtained leave and filed it; got a rule to answer it and appeared and obtained a reference; that he had appeared that day before the master and proved up the case; that he would examine the report of the proceedings and the master's report and argue exceptions if any were filed; prepare a decree of foreclosure, cause publication, attend the sale and see to proper distribution; see to the proper accounting and application of rents being collected by an agent; that from an extensive practice and experience in chancery and foreclosure proceedings it was his opinion the allowance of \$1,500 was a reasonable and the usual and customary fee for such services rendered and to be rendered. There was no other evidence upon this question, and the court made an allowance of \$1,500 in the decree entered in this cause.

The proceedings supplemental and subsequent to the decree entered in the cause upon which the re-reference was made, and

proceedings as to the allowance of attorney's fees. This appeal

100-443887-100

[illegible]

the extent of the similarity to interview their types used

THE NEW YORK PUBLIC LIBRARY
ASTOR LENOX TILDEN FOUNDATION
500 5TH AVENUE
NEW YORK 17, N.Y.

also provides that as part of the exercise of jurisdiction

"The Honorable Secretary's letter" may be reviewed and found as correct.

• 1900. 1901. 1902. 1903. 1904. 1905. 1906. 1907. 1908. 1909. 1910. 1911. 1912. 1913. 1914. 1915. 1916. 1917. 1918. 1919. 1920. 1921. 1922. 1923. 1924. 1925. 1926. 1927. 1928. 1929. 1930. 1931. 1932. 1933. 1934. 1935. 1936. 1937. 1938. 1939. 1940. 1941. 1942. 1943. 1944. 1945. 1946. 1947. 1948. 1949. 1950. 1951. 1952. 1953. 1954. 1955. 1956. 1957. 1958. 1959. 1960. 1961. 1962. 1963. 1964. 1965. 1966. 1967. 1968. 1969. 1970. 1971. 1972. 1973. 1974. 1975. 1976. 1977. 1978. 1979. 1980. 1981. 1982. 1983. 1984. 1985. 1986. 1987. 1988. 1989. 1990. 1991. 1992. 1993. 1994. 1995. 1996. 1997. 1998. 1999. 2000. 2001. 2002. 2003. 2004. 2005. 2006. 2007. 2008. 2009. 2010. 2011. 2012. 2013. 2014. 2015. 2016. 2017. 2018. 2019. 2020. 2021. 2022. 2023. 2024. 2025. 2026. 2027. 2028. 2029. 2030. 2031. 2032. 2033. 2034. 2035. 2036. 2037. 2038. 2039. 2040. 2041. 2042. 2043. 2044. 2045. 2046. 2047. 2048. 2049. 2050. 2051. 2052. 2053. 2054. 2055. 2056. 2057. 2058. 2059. 2060. 2061. 2062. 2063. 2064. 2065. 2066. 2067. 2068. 2069. 2070. 2071. 2072. 2073. 2074. 2075. 2076. 2077. 2078. 2079. 2080. 2081. 2082. 2083. 2084. 2085. 2086. 2087. 2088. 2089. 2090. 2091. 2092. 2093. 2094. 2095. 2096. 2097. 2098. 2099. 2100. 2101. 2102. 2103. 2104. 2105. 2106. 2107. 2108. 2109. 2110. 2111. 2112. 2113. 2114. 2115. 2116. 2117. 2118. 2119. 2120. 2121. 2122. 2123. 2124. 2125. 2126. 2127. 2128. 2129. 2130. 2131. 2132. 2133. 2134. 2135. 2136. 2137. 2138. 2139. 2140. 2141. 2142. 2143. 2144. 2145. 2146. 2147. 2148. 2149. 2150. 2151. 2152. 2153. 2154. 2155. 2156. 2157. 2158. 2159. 2160. 2161. 2162. 2163. 2164. 2165. 2166. 2167. 2168. 2169. 2170. 2171. 2172. 2173. 2174. 2175. 2176. 2177. 2178. 2179. 2180. 2181. 2182. 2183. 2184. 2185. 2186. 2187. 2188. 2189. 2190. 2191. 2192. 2193. 2194. 2195. 2196. 2197. 2198. 2199. 2200. 2201. 2202. 2203. 2204. 2205. 2206. 2207. 2208. 2209. 2210. 2211. 2212. 2213. 2214. 2215. 2216. 2217. 2218. 2219. 2220. 2221. 2222. 2223. 2224. 2225. 2226. 2227. 2228. 2229. 2230. 2231. 2232. 2233. 2234. 2235. 2236. 2237. 2238. 2239. 2240. 2241. 2242. 2243. 2244. 2245. 2246. 2247. 2248. 2249. 2250. 2251. 2252. 2253. 2254. 2255. 2256. 2257. 2258. 2259. 2260. 2261. 2262. 2263. 2264. 2265. 2266. 2267. 2268. 2269. 2270. 2271. 2272. 2273. 2274. 2275. 2276. 2277. 2278. 2279. 2280. 2281. 2282. 2283. 2284. 2285. 2286. 2287. 2288. 2289. 2290. 2291. 2292. 2293. 2294. 2295. 2296. 2297. 2298. 2299. 2300. 2301. 2302. 2303. 2304. 2305. 2306. 2307. 2308. 2309. 2310. 2311. 2312. 2313. 2314. 2315. 2316. 2317. 2318. 2319. 2320. 2321. 2322. 2323. 2324. 2325. 2326. 2327. 2328. 2329. 2330. 2331. 2332. 2333. 2334. 2335. 2336. 2337. 2338. 2339. 2340. 2341. 2342. 2343. 2344. 2345. 2346. 2347. 2348. 2349. 2350. 2351. 2352. 2353. 2354. 2355. 2356. 2357. 2358. 2359. 2360. 2361. 2362. 2363. 2364. 2365. 2366. 2367. 2368. 2369. 2370. 2371. 2372. 2373. 2374. 2375. 2376. 2377. 2378. 2379. 2380. 2381. 2382. 2383. 2384. 2385. 2386. 2387. 2388. 2389. 2390. 2391. 2392. 2393. 2394. 2395. 2396. 2397. 2398. 2399. 2400. 2401. 2402. 2403. 2404. 2405. 2406. 2407. 2408. 2409. 2410. 2411. 2412. 2413. 2414. 2415. 2416. 2417. 2418. 2419. 2420. 2421. 2422. 2423. 2424. 2425. 2426. 2427. 2428. 2429. 2430. 2431. 2432. 2433. 2434. 2435. 2436. 2437. 2438. 2439. 2440. 2441. 2442. 2443. 2444. 2445. 2446. 2447. 2448. 2449. 2450. 2451. 2452. 2453. 2454. 2455. 2456. 2457. 2458. 2459. 2460. 2461. 2462. 2463. 2464. 2465. 2466. 2467. 2468. 2469. 2470. 2471. 2472. 2473. 2474. 2475. 2476. 2477. 2478. 2479. 2480. 2481. 2482. 2483. 2484. 2485. 2486. 2487. 2488. 2489. 2490. 2491. 2492. 2493. 2494. 2495. 2496. 2497. 2498. 2499. 2500. 2501. 2502. 2503. 2504. 2505. 2506. 2507. 2508. 2509. 2510. 2511. 2512. 2513. 2514. 2515. 2516. 2517. 2518. 2519. 2520. 2521. 2522. 2523. 2524. 2525. 2526. 2527. 2528. 2529. 2530. 2531. 2532. 2533. 2534. 2535. 2536. 2537. 2538. 2539. 2540. 2541. 2542. 2543. 2544. 2545. 2546. 2547. 2548. 2549. 2550. 2551. 2552. 2553. 2554. 2555. 2556. 2557. 2558. 2559. 2560. 2561. 2562. 2563. 2564. 2565. 2566. 2567. 2568. 2569. 2570. 2571. 2572. 2573. 2574. 2575. 2576. 2577. 2578. 2579. 2580. 2581.

that a no CO₂ is necessary as laboratory tests will

recovery of the system is not possible. The system is not recoverable.

The trial of several persons was held at the same time.

the value thereof was made by expert witness, one of the attorneys

of record. Our attention is called to his testimony by the following

and has shown a tendency to become more and more

original text and compared to original; no significant difference

leave and tried to get a job; it didn't pay well.

obtained a reference; that he had upon that day before the master

and proved up the same; that he would examine the report of the survey-

STATION 11

1944, 1945, 1946, 1947, 1948, 1949, 1950, 1951, 1952, 1953, 1954, 1955, 1956, 1957, 1958, 1959, 1960, 1961, 1962, 1963, 1964, 1965, 1966, 1967, 1968, 1969, 1970, 1971, 1972, 1973, 1974, 1975, 1976, 1977, 1978, 1979, 1980, 1981, 1982, 1983, 1984, 1985, 1986, 1987, 1988, 1989, 1990, 1991, 1992, 1993, 1994, 1995, 1996, 1997, 1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097, 2098, 2099, 2100, 2101, 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2118, 2119, 2120, 2121, 2122, 2123, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138, 2139, 2140, 2141, 2142, 2143, 2144, 2145, 2146, 2147, 2148, 2149, 2150, 2151, 2152, 2153, 2154, 2155, 2156, 2157, 2158, 2159, 2160, 2161, 2162, 2163, 2164, 2165, 2166, 2167, 2168, 2169, 2170, 2171, 2172, 2173, 2174, 2175, 2176, 2177, 2178, 2179, 2180, 2181, 2182, 2183, 2184, 2185, 2186, 2187, 2188, 2189, 2190, 2191, 2192, 2193, 2194, 2195, 2196, 2197, 2198, 2199, 2200, 2201, 2202, 2203, 2204, 2205, 2206, 2207, 2208, 2209, 2210, 2211, 2212, 2213, 2214, 2215, 2216, 2217, 2218, 2219, 2220, 2221, 2222, 2223, 2224, 2225, 2226, 2227, 2228, 2229, 2230, 2231, 2232, 2233, 2234, 2235, 2236, 2237, 2238, 2239, 2240, 2241, 2242, 2243, 2244, 2245, 2246, 2247, 2248, 2249, 2250, 2251, 2252, 2253, 2254, 2255, 2256, 2257, 2258, 2259, 2260, 2261, 2262, 2263, 2264, 2265, 2266, 2267, 2268, 2269, 2270, 2271, 2272, 2273, 2274, 2275, 2276, 2277, 2278, 2279, 2280, 2281, 2282, 2283, 2284, 2285, 2286, 2287, 2288, 2289, 2290, 2291, 2292, 2293, 2294, 2295, 2296, 2297, 2298, 2299, 2300, 2301, 2302, 2303, 2304, 2305, 2306, 2307, 2308, 2309, 2310, 2311, 2312, 2313, 2314, 2315, 2316, 2317, 2318, 2319, 2320, 2321, 2322, 2323, 2324, 2325, 2326, 2327, 2328, 2329, 2330, 2331, 2332, 2333, 2334, 2335, 2336, 2337, 2338, 2339, 2340, 2341, 2342, 2343, 2344, 2345, 2346, 2347, 2348, 2349, 2350, 2351, 2352, 2353, 2354, 2355, 2356, 2357, 2358, 2359, 2360, 2361, 2362, 2363, 2364, 2365, 2366, 2367, 2368, 2369, 2370, 2371, 2372, 2373, 2374, 2375, 2376, 2377, 2378, 2379, 2380, 2381, 2382, 2383, 2384, 2385, 2386, 2387, 2388, 2389, 2390, 2391, 2392, 2393, 2394, 2395, 2396, 2397, 2398, 2399, 2400, 2401, 2402, 2403, 2404, 2405, 2406, 2407, 2408, 2409, 2410, 2411, 2412, 2413, 2414, 2415, 2416, 2417, 2418, 2419, 2420, 2421, 2422, 2423, 2424, 2425, 2426, 2427, 2428, 2429, 2430, 2431, 2432, 2433, 2434, 2435, 2436, 2437, 2438, 2439, 2440, 2441, 2442, 2443, 2444, 2445, 2446, 2447, 2448, 2449, 2450, 2451, 2452, 2453, 2454, 2455, 2456, 2457, 2458, 2459, 2460, 2461, 2462, 2463, 2464, 2465, 2466, 2467, 2468, 2469, 2470, 2471, 2472, 2473, 2474, 2475, 2476, 2477, 2478, 2479, 2480, 2481, 2482, 2483, 2484, 2485, 2486, 2487, 2488, 2489, 2490, 2491, 2492, 2493, 2494, 2495, 2496, 2497, 2498, 2499, 2500, 2501, 2502, 2503, 2504, 2505, 2506, 2507, 2508, 2509, 2510, 2511, 2512, 2513, 2514, 2515, 2516, 2517, 2518, 2519, 2520, 2521, 2522, 2523, 2524, 2525, 2526, 2527, 2528, 2529, 2530, 2531, 2532, 2533, 2534, 2535, 2536, 2537, 2538, 2539, 2540, 2541, 2542, 2543, 2544, 2545, 2546, 2547, 2548, 2549, 2550, 2551, 2552, 2553, 2554, 2555, 2556, 2557, 2558, 2559, 2560, 2561, 2562, 2563, 2564, 2565, 2566, 2567, 2568, 2569, 2570, 2571, 2572, 2573, 2574, 2575, 2576, 2577, 2578, 2579, 2580, 2581, 2582, 2583, 2584, 2585, 2586, 2587, 2588, 2589, 2590, 2591, 2592, 2593, 2594, 2595, 2596, 2597, 2598, 2599, 2600, 2601, 2602, 2603, 2604, 2605, 2606, 2607, 2608, 2609, 2610, 2611, 2612, 2613, 2614, 2615, 2616, 2617, 2618, 2619, 2620, 2621, 2622, 2623, 2624, 2625, 26

the case and see to proper distribution; see to the proper accounting

and application of these rules collected by an agent; that there is

—on movement in relation to the subject's position.

sidencever a new GCM, it is impossible to maintain the same level of security.

and the usual and customary for the same and the same

be resolved. There was no other evidence on this question, and

the court made an allowance of \$1,000 to cover the same and

• 2000

It is recommended that the following information be provided to the public:

collected in the same way which the re-formation of water, and

hearings had, pertained not to the right of the foreclosure of the trust deed, but as suggested by the defendant, involved the right of Krachack, one of the plaintiffs, who held a leasehold interest in the premises, to have the mortgage indebtedness subordinated to his leasehold interest; and the defendant further suggests that these matters thus affecting only the private leasehold right of one of the plaintiffs, did not fall within the contract provision of the trust deed for reasonable attorney's fees to be allowed for the foreclosure of the lien of the trust deed, and cites the provision of the trust deed which provides:

"all expenses and disbursements paid or incurred in behalf of complainant in connection with the foreclosure hereof including reasonable solicitor's fees * * * shall be paid by the grantors."

and the contention is made that services in foreclosure cases, for which attorney's fees are allowed upon contract, and usually proven up on default, should be detailed and the court should exercise its judgment upon the advisory testimony of a plaintiff's solicitor and that the testimony of Mr. Abrams, solicitor for the plaintiffs, as to what would be a fair, reasonable, usual and customary fee for the services rendered, and to be rendered, gave no estimate of the value of the services performed.

The reply of the plaintiffs to this contention is that no objections were filed to the report of the master recommending the allowance of the fees, and in the absence of objections and a rule thereon by the master, such question is not open for review on appeal, and plaintiffs further suggest that no objections were filed to the master's report so that the master had no occasion to rule on the reasonableness of the fees. No exceptions were filed with the court prior to the entry of the decree allowing the fees; and further, the plaintiffs suggest that it is true appellant filed a document called "Exceptions and Objections" on the filing of the Supplemental Report and stated therein that he excepted to the original report.

This, however, was of no avail as no objections were filed before the master, either to the original report or to the supplemental report. The supplemental report did not deal with the question of fees. And it is further suggested that an exception on a point to which no objections were filed does not save the point for review on appeal, and the following cases are cited: Davis v. Bittenhouse & Embree Co., 92 Ill. App. 341; Beastur Coal Co. v. Slokey, 832 Ill. 253. In the Beastur Coal Co. case the court states the orderly procedure in obtaining a review on matters recommended by a master. The following steps are necessary: (1) Taking evidence; (2) rendition of the Report; (3) An opportunity to file objections; (4) A supplemental Report ruling on the objections, and (5) Filing of the Report, including the ruling of the objections. The court in this latter case did say:

"The Report is in all things final as to the question of fact unless followed by exceptions before the Chancellor within the time fixed by the rule of court or by order of the court in the case. The exceptions must cover every finding of fact made by the master, conceived by the solicitor to be erroneous so far as they were material and covered by the objections. No question of fact is open for review on appeal or error if not preserved in the record by the method and in the manner indicated."

Therefore, the reasonableness of fees is a question of fact.

(Casler v. Evers, 139 Ill. 357.) Having filed no objections on the question involved in this appeal it is not open for review and the filing of the document called "Exceptions" was of no avail. (Julin v. Rister Poths Mfg. Co., 54 Ill. App. 460). There it was said:

"Upon the authority of the cases cited, and many others that can be found by reference to the text books, the correct practice would have been to have overruled the exceptions of both parties, so far the first time filed, and to have confirmed the master's report for want of objections having been presented to and considered by him."

It appears from the argument of the defendant that while it is true no objections of any kind were filed originally to the original master's report, yet it is also true that after the decree

of foreclosure was entered the petition of Samuel J. Gould here in question, was filed on October 11, 1938, in which he shows that through inadvertence and mistake of his attorney, he had not been advised of the original hearing before the master. He prayed that the decree be vacated and for re-reference to the master in chancery for the purpose of hearing further proofs and making findings, conclusions of law and recommendations and for other relief. On October 11, 1938, the court entered its order allowing Gould to file instantter his petition to vacate the decree of foreclosure and sale, ruled all parties to answer the petition within five days, and set the issues raised upon the petition for hearing on October 19, 1938. Thereupon, on October 15, the plaintiffs filed their answer to the petition. On October 30, the court considered the petition and answers, and ordered that without vacating or otherwise affecting the decree of foreclosure the cause be re-referred to the master for the purpose of taking testimony to be offered by Gould upon the issues and testimony in rebuttal thereof. The court further required Gould to deposit with the clerk \$300 as security for costs and retained jurisdiction for the purpose of disposing of the prayers of the petition and passing upon the supplemental report of the master, which was directed to be filed by November 14, 1938.

It appears from the record that hearings were had by the master on October 24th and 27th and the master's supplemental report was filed on November 16, 1938, containing a report of the proceedings in which the master found against the contentions of Gould concerning the lease and reaffirmed all his prior findings in his original report.

Thereafter, on December 11, 1938, the court overruled Gould's exceptions as to the priority of the lease, and on December 13, 1938 overruled his exceptions as to the allowance of attorney's

fees. However, it appears from the record that the court passed upon the question of attorney's fees in the decree entered fixing the allowance at \$1,500, and approved the master's report upon this issue. And again, the court in passing upon the finding upon this question in the supplemental report of the master denied the objections which were filed and regarded as exceptions to the allowance of the attorney's fees. At no time was there any evidence as to the value of the services other than that of the attorney for the plaintiffs, and we believe the court was justified in entering the foreclosure decree and order denying the prayer of the petitioner Samuel J. Gould that the decree be vacated as to the allowance of solicitor's fees.

In view of our conclusions in this proceeding it will not be necessary to pass upon the motion of the plaintiffs for a dismissal of the appeal for want of jurisdiction, which this court reserved to the final hearing.

The order denying the relief prayed for in the petition of Samuel J. Gould is affirmed.

ORDER AFFIRMED.

DENNIS E. SULLIVAN, P.J. AND BURKE, J. CONCUR.

[illegible]

[Faint, illegible text at the bottom of the page]

This reserved book is not transferable and must not be taken from the library, except when properly charged out for overnight use.

Date

Name

10/7	A. H. Walker	
	AN 3-7300	
12/63	J. H. H. H.	346-1473
12-20	9. M. H. H.	
RA 2-2500	RA 6-2500	
3/3	W. H. H.	FR-5818
3/25	M. H. H.	
10/11	J. H. H.	FR-L-245
11/1/60	H. H. H.	
11/1/60	H. H. H.	
7-23-67	Robert Smith	AN 3-3753
7/24/71	NARVICK	FI-6-5800
5/25/72	H. H. H.	335-7036
6/1/72	H. H. H.	335-7036
12/14/72	Severing	263-450
7/2/72	R. H. H.	442-500

